No. 98-594

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

DON LEE DISTRIBUTOR, INC. (WARREN), DON LEE DISTRIBUTOR, INC. (DEARBORN), POWERS DISTRIBUTING COMPANY, INC., EASTOWN DISTRIBUTORS CO., HUBERT DISTRIBUTORS, INC. and OAK DISTRIBUTING CO.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 1038,

Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTERVENOR TEAMSTERS LOCAL 1038'S BRIEF IN OPPOSITION TO THE DISTRIBUTORS' PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Sixth Circuit correctly found that substantial evidence supported the National Labor Relations Board's ruling that the amended complaint allegations of unlawful joint bargaining were not barred by Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b).

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STATUTORY PROVISIONS

Applicable statutory provisions are set forth in the Appendix at App. 176a through 177a.

STATEMENT OF THE CASE

The Distributors'[1] Petition mischaracterizes the Sixth Circuit's decision in their attempt to conjure a "split in the circuits" sufficient to warrant review by this Court. (See Petition, pp. 3, 12, 14-15, and 18). The Sixth Circuit's decision does not establish a new standard in applying the statute of limitations in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). The Sixth Circuit's decision is not in conflict with decisions of other circuits or with decisions of this Court.

The Sixth Circuit held that substantial evidence supported the National Labor Relations Board's ruling that the General Counsel's joint bargaining[2] amendment to the complaint was not time-barred. The Administrative Law Judge ("ALJ"), the Board and the Sixth Circuit each found that there were two separate and independent grounds for this conclusion. First, under the "closely related" legal doctrine, the amendment to the complaint was not time-barred. (App. 50a-53a, 57a and 85a; App. 29a; App. 11a, 14a n.6 and 19a-21a).[3] Second, under

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[1] The Employers are referred to collectively as "the Distributors" and individually by their respective names (Don Lee Dearborn, Don Lee Warren, Oak, Powers, Hubert and Eastown). West Coast Industrial Relations Association is denoted as WCIRA. WCIRA's chief officers and the spokesmen for the Distributors were Attorney Fred Long and Chris Thomas. Charging Party Teamsters Local 1038 is referred to as the Union. The Union's president and chief spokesperson was Robert Knox.

[2] The terms "joint bargaining", "multi-employer bargaining" and "multi-unit bargaining" are used interchangeably herein.

[3] "App. —" denotes a page reference to the Appendix attached to the Distributors' Petition for a Writ of Certiorari and supplemented by the Appendix attached to this Brief in Opposition. Appendix 1a through 122a is attached to the Distributors' Petition for a Writ. Appendix 123a through 177a is attached to this Brief in Opposition. Because the Distributors' Appendix version of the Sixth Circuit's decision (App. 1a-23a) contains an inadvertent

the separate legal doctrine of fraudulent concealment, the amendment to the complaint was not time-barred. (App. 50a-58a and 85a; App. 29a-30a; App. 11a, 14a n.6 and 19a-22a).

The Distributors' Petition to this Court attempts to present a question regarding the Sixth Circuit's application of the fraudulent concealment doctrine only.[4] The Distributors "do not challenge the holding" below that under the "closely related" doctrine, the amendment was timely. (See Petition, p. 10).

Even if the fraudulent concealment doctrine were not applied to this case, under the separate and unchallenged "closely related" doctrine, the amendment was timely. Any review of the Sixth Circuit's application of the fraudulent concealment doctrine by writ of certiorari would not affect the disposition of this case. There is no reason to grant the Petition. See 28 U.S.C. § 1254(1).

Moreover, even if the fraudulent concealment doctrine were the only basis for the holding that the allegations were timely, the application of the fraudulent concealment doctrine to this case was in conformity with guidance from this Court, with established Board law and with the law in the circuits. The Board and the circuits have used a three-part standard for application of the fraudulent concealment doctrine—i.e. deliberate concealment of material facts from an injured party whose ignorance of such facts is not attributable to a lack of due diligence. The Sixth Circuit did not create a new standard or depart from established authority. The Sixth Cir-

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omission of a sentence, another copy of the decision (App. 123a-144a) is attached.

[4] The Distributors do not challenge the decisions of the ALJ, the Board and the Sixth Circuit that the Distributors committed the unfair labor practices of bad faith bargaining by unlawfully engaging in joint bargaining without Union consent (and not lawful coordinated bargaining) during the time period from the inception of bargaining in March, 1990 through the illegal implementations of their proposals on February 7, 1991 and April 15, 1991 and through the last bargaining session on August 21, 1991.

cuit simply found that there was substantial evidence to support the Board's finding that the Distributors had deliberately concealed the terms of their Pact (App. 145a-150a); that the terms of the Pact were material to the question of joint bargaining; and that the Union had been diligent. The Distributors' argument is actually an argument about the findings of fact made below and is not about the correct legal standard. The Petition must be denied.

A. *The Unlawful Joint Bargaining and Consistent Concealment* [5]

The Distributors' descriptions of the facts and the decisions below are misleading and incorrect. The actual facts demonstrate that the Union repeatedly inquired, requested documents, elicited sworn testimony and even subpoenaed documents relating to possible joint bargaining arrangements between the Distributors and that the Distributors consistently responded with lies, denials and evasions. This case involves more than a single lie or a mere denial by the Distributors of unlawful joint bargaining. This case involves a secret scheme by the Distributors to bargain jointly which they successfully concealed from the Union and the Board from March of 1990 until their Pact was

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[5] This summary highlights significant events relating to continued Union requests about the arrangements among the Distributors with respect to bargaining and the Distributors' consistent lies and evasions. For detailed background of the unlawful joint bargaining, see App. 3a-22a, 26a-30a and 42a-104a. While the Distributors' Petition is based solely on the Sixth Circuit's application of the fraudulent concealment doctrine, the Distributors recitation of facts contains misrepresentations of alleged Union misconduct in negotiations (Petition, p. 5) and their argument contends that a "remand" is necessary to determine whether the Union's alleged misconduct licensed the Distributors' violations of Section 8(a)(5) of the Act. (Petition, p. 10, n.5) Because the Distributors have not petitioned on this ground, this Brief in Opposition does not address these factual misrepresentations and erroneous legal argument. The facts and the law regarding this unmeritorious affirmative defense were specifically addressed by the ALJ, the Board and the Sixth Circuit.

produced on November 16, 1992. Set forth below is a chronological summary of significant facts regarding the fraudulent concealment of the terms of the Pact.

In 1987, the Union bargained with a multi-employer asociation known as DDOM which included the six Distributors. (APX 1695-96).[6] The Union and DDOM agreed to engage in joint bargaining. (AXP 1695). The Union was furnished with a copy of the Power of Attorney which bound the DDOM Employers to joint bargaining. DDOM and the Union reached a collective bargaining agreement for the term August 17, 1987 to May 1, 1990. (RX 4; APX 998-1052; App. 43a-44a).

In December of 1989 and January of 1990, each of the Distributors withdrew from DDOM and advised the Union of its intent to bargain separately. (GCX 25, 34-37; APX 179, 181-84).

On January 18, 1990, the Distributors signed their secret Pact to bargain jointly. (GCX 18; APX 157-60; App. 145a-150a, 6a). The Pact provided for:

- cost-sharing in case of a strike;
- cost-sharing for a $100,000 public relations campaign;
- prohibitions on actions by non-struck Distributors inconsistent with the "purposes" of the Pact in the event of a strike against any Distributor;
- 22 "minimum objectives" which cannot be changed by an individual Distributor and which can only be changed for all six Distributors after a majority vote approving the change;
- a prohibition against any Distributor bargaining *directly* with the Union;

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[6] (GCX —) refers to a General Counsel Exhibit. (RX —) refers to an Exhibit of the six Distributors. (CPX —) refers to a Charging Party Exhibt. (JX —) refers to a Joint Exhibit. Each reference to exhibits is followed by a page reference to the Sixth Circuit Joint Appendix where the exhibit is located. The Joint Appendix and Amended Supplemental Joint Appendix used before the Sixth Circuit are cited as (APX —).

- the assesment of a $1,600,000 penalty, plus damages, against any Distributor who breaches the Pact, or negotiates directly with the Union, or settles with the Union on terms "in excess of" the 22 minimum objectives pre-approved by all six Distributors;
- enforcement of the Pact in any Michigan state court of competent jurisdiction.

Neither the Pact itself nor the terms of the Pact were disclosed to the Union or the General Counsel, despite a 1990 subpoena for documents, despite questions under oath and despite repeated requests, until November 16, 1992. (App. 11a). The Pact actually prohibits any Distributor from engaging in lawful separate or "coordinated" bargaining. The Pact requires each Distributor to engage in unlawful joint bargaining (i.e., joint bargaining without the Union's consent). The Distributors' bargaining conduct was in accordance with terms of their secret Pact.

Don Lee Dearborn filed a unit clarification petition with the NLRB (case no. 7-UC-374). A hearing was scheduled for March 8, 1990. The Union served an NLRB Subpoena (Subpoena No. B-37283) (App. 151a-157a) on Donald Klopcic, President of both Don Lee Dearborn and Don Lee Warren, for the production of certain documents at the hearing, including "[a]ny and all documents . . . pertaining to the Employer's membership or participation in any employer association or to the Employer's assignment of bargaining and/or representational rights and/or responsibilities to any such employer association or entity or individual including West Coast Industrial Relations Association, Fred Long, Patrick Jordan . . . from January 1, 1988 to the present. (GC 47; JAPX 2194-2197; App. 155a). The Distributor did not produce the Pact. (App. 11a, n.4). At the hearing, Robert Van Goethem, Corporate Controller of Don Lee Dearborn and General Manager of Don Lee Warren, professed ignorance of the Pact. Donald Klopcic, President of both Don Lee Dearborn and Don Lee Warren, denied that the Pact existed. (APX 1563-65, 1601; App. 158a-161a).

On March 23, 1990, Long wrote the Distributors to quell their "paranoia." Long explained that he had employed Jordan to ensure that Knox would be "both frustrated and confused because although he knows WCIRA is lurking out there somewhere, he isn't sure how he will be attacked. Meanwhile, Jordan, the son-of-a-bitch that he is, has put all kinds of pressure on Knox." Long cautioned the Distributors not to reveal their strategy. (CPX 17; APX 1526-30; App. 162a-168a).

On March 27, 1990 bargaining began.[7] Knox asked Long whether the Distributors had entered into any kind of mutual aid pact. Long affirmatively lied about the arrangements among the Distributors and denied the existence of the Pact. Long replied, "I don't know if there is one [an agreement] or not." Long said the Distributors "could go off any way they want on their own." (APX 1703) and "could retain someone else [i.e., other than Long] without penalty." (App. 56a-57a; APX 1674, 1706). *The truth was* that on January 18, 1990, the Distributors (with the advice of Long) signed a secret "Mutual Aid Pact" (GCX 18; APX 157-60; App. 6a-7a; App. 145a-150a) which "clearly prohibited such acts on pain of substantial financial penalty." (App. 22a).

At the April 18, 1990 concurrent session, the Union again asked and the Distributors again denied the existence of the Pact. (APX 1710; App. 7a).

At the May 22, 1990 concurrent session, Knox questioned the Distributors about their alleged "coordinated" bargaining. Long responded their bargaining was not "joint" because some Distributors had separate issues and there would be minor differences. (APX 1723) Knox again pointed out the differences between Distributors and questioned the bargaining arrangements among the Distributors. Again, Long did not disclose the Pact. (APX 1723; App. 8a).

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[7] From March 27 through June 27, 1990, the parties met in "concurrent" sessions for all Distributors. Beginning with July 12, 1990, each bargaining session was designated for a particular Distributor.

At the June 27, 1990 concurrent session, the Union gave an economic proposal and requested true separate bargaining. (APX 1728-30) Thomas, who had replaced Long, replied that he would go along with the Union's request (although he did not) because he was legally required to do so. (APX 1735) Knox again inquired regarding the existence of the Pact. Thomas was unresponsive and evasive. (APX 1733).

Beginning on July 12, 1990, each bargaining session was designated for a particular Distributor. However, the management representatives who attended these allegedly "separate" sessions admittedly bargained for the interests of the Distributor who employed them rather than for the interests of the particular Distributor designatd for bargaining. (APX 1940, 2065-66). The unlawful and secret joint bargaining continued.

At the August 8, 1990 Oak session, the Union again asked for disclosure of any document describing the bargaining relationship between the Distributors and WCIRA. Thomas refused and asserted confidentiality. (APX 1764; App. 9a)

At the September 20, 1990 Don Lee Warren session, Knox again specifically asked about any written or oral agreement between the Distributors about negotiations. (APX 1780; App. 9a) Both Gustafson of Hubert and Van Goethem of Don Lee Warren affirmatively lied and denied that that there was a pact of any kind among the Distributors. (APX 1780; App. 9a) At the October 15, 1990 Hubert session, Knox complained that the Distributors were engaged in joint bargaining. Thomas denied that the Distributors were bargaining jointly. (APX 1788-1789)

On November 8, 1990, Knox wrote WCIRA. Knox continued to request separate meetings for each Distributor and "true separate bargaining." (GCX 98; APX 594-95) On November 9, 1990 Long responded by characterizing Knox's request for separate bargaining as "surface bargaining" by the Union. Long threatened impasse and implementation. (GCX 99; APX 596-601)

At the December 6, 1990 Eastown session, Long made a death threat against Knox. (APX 1799; App. 102a-103a)

On January 8, 1991, Knox again wrote that he wanted "true separate negotiations." (GCX 119; APX 628) Knox's insistence on separate negotiations caused Thomas to conclude that impasse had been reached for all six Distributors. (APX 2154-2155)

On February 7, 1991, the Distributors unilaterally implemented the non-economic portions of their LBOs. (App. 10a)

On April 3, 1991, the Union filed unfair labor practice charges against the Distributors. The six month period prior to this filing date is October 3 1990. The charges each alleged:

> "In the six months prior to the filing of this Charge, the Employer has violated Section 8(a)(5) of the Act by bargaining in bad faith and by, on or about February 4, 1991, unilaterally implementing terms and conditions of employment prior to reaching a *bona fide* impasse."

(APX 64, 67, 70, 73 and 79)

On April 15, 1991, the Distributors implemented the economic portions of their LBOs.[8] (App. 10a) The

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[8] These Draconian changes drastically cut wages and benefits for Union-represented employees of all six Distributors. For example, the Distributors unilaterally eliminated the $8.33 hourly base wage for truck drvers; eliminated the $7.65 hourly base wage for helpers; imposed a cut of $1.95 to $5.00 per hour for warehouse employees; imposed a cut of $1.50 to $3.00 per hour for reclamation employees; reduced holiday pay; eliminated four paid holidays; created a right to employ so-called "casuals" who have no contract rights or benefits and whose wages and conditions are set by management; created a right to use "casuals" for up to 50% of the work force; reduced vacation benefits; reduced health benefits; and created a unilateral right of management to make new rules without bargaining. This is a brief synopsis of the "highlights" of the Distributors' unilateral implementations which is evident from comparing the 1987-1990 DDOM Agreement to the jointly imposed LBOs. (RX 4; GCX 83(a)-(e); APX 998-1054, 445-559).

charges were amended to include the April 15, 1991 implementations.

On June 20, 1991, the NLRB Regional Director issued a partial dismissal of the Union's April 3, 1991 charges. The Regional Director found that there was insufficient evidence to support the Union's claim that the Distributors had bargained in bad faith by engaging in non-consensual joint bargaining. (APX 645-46; App. 12a-13a) The Union appealed to the NLRB General Counsel. (App. 13a and 49a) Thus, the joint bargaining allegations of the April 3, 1991 charges remained pending.

At the July 12, 1991 bargaining session, the Union again requested the Distributors to produce any document "that spelled out the employers' relationship to each other for purposes of collective bargaining." The Union specifically asked whether "there were any penalty provisions amongst the distributors." (App. 10a) Thomas, who claimed that the only written document he knew of was a fee schedule, conditioned disclosure on the Union's agreement to engage in group bargaining. Thomas certainly did not disclose (indeed he testified that he did not even know) that the Pact literally prohibited the Distributors from bargaining separately and actually required them to bargain jointly without Union consent. (APX 2125-2127; App. 169a-171a) The Union followed up with a letter reiterating its request and explaining the relevancy of the information it sought. Thomas responded by asserting attorney-client privilege and denying relevancy. (GCX 143 and 144; APX 643-646)

On July 26, 1991, the Regional Director issued a complaint based on certain bad faith bargaining allegations of the Union's April 3, 1991 charges. The Union appealed the joint bargaining allegations which were the subject of the Regional Director's June 20, 1991 partial dismissal. (App. 13a)

August 21, 1991 was the last bargaining session.

On July 6, 1992, Long wrote the NLRB Office of Appeals regarding the Union's allegations that the Distributors engaged in unlawful joint bargaining. Long lied to the NLRB. He stated:

> "Union alleges Employer had some kind of agreement making bargaining illegal. Although union could only speculate, Employers had only one agreement amongst them and that was a mutual aid pact sharing costs to pay negotiations, security protection if a strike occurred and related. None of the parties entered into any agreement that would restrict their bargaining."

(APX 161-B; App. 172a-175a; see App. 13a and 55a)

On July 28, 1992, the NLRB General Counsel, in partial reliance on Long's misrepresentations, denied the Union's appeal and affirmed the Regional Director's dismissal of the joint bargaining allegation, because "the evidence was insufficient to meet the burden of establishing that the Distributors had entered into an agreement to restrict separate agreements by the parties. . . ." (GCX 19(a); APX 162-163)[9]

On November 16, 1992, in response to a trial subpoena, the Distributors finally produced the Pact. (App. 14a; App. 145a-150a) The document demonstrates that the Distributors embarked on a secret course of illegal joint bargaining from the outset of negotiations and each act was done in accordance with this Pact. Upon review of the Pact, the Regional Director sought permission from the General Counsel to revoke his previous partial dismissal of the unlawful joint bargaining allegations. The Distributors were then afforded an opportunity to present their position(s). (APX 106, para. 4)

On January 22, 1993, the General Counsel withdrew his July 28, 1992 denial of the Union's appeal with respect

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[9] Thus, the joint bargaining allegations of the April 3, 1991 charges remained pending at least until July 28, 1992—i.e., within 6 months of the Board's January 27, 1993 Motion to Amend.

to the unlawful joint bargaining allegations of the April 3, 1991 charges and reinstated those allegations. (APX 106, para. 5)

On January 27, 1993, the General Counsel submitted a motion to the ALJ to amend the complaint to incorporate the joint bargaining allegations asserted in the April 3, 1991 charges. (See APX 104-17) On February 18, 1993, the ALJ permitted the amendment to the complaint. (See App. 50a)

These facts demonstrate that the Distributors have lied repeatedly [10] about their Pact to bargain jointly and that the General Counsel and Union were diligent. The Distributors impermissibly bargained as a group without Union consent in order to jointly and unilaterally inflict massive cutbacks in employee wages and benefits. This unlawful conduct occurred from the inception of bargaining on March 27, 1990 and the fraudulent concealment commenced on March 8, 1990 (prior to bargaining) and continued November 16, 1992.

This case started with a lie to the Union at the UC hearing on March 8, 1990, when Klopcic failed to produce the Pact under subpoena and testified that there was no agreement among the Distributors. (App. 151a-160a) This case was fueled with repeated lies and evasions by the Distributors to the Union during bargaining regarding the existence and terms of the Pact. That is why the Sixth Circuit found that: "Here, the facts could scarcely be stronger in support of the NLRB's finding of fraudulent concealment." (App. 21a) *This case climaxed with Long's lie to the General Counsel's Office of Appeals* on July 6, 1992 that, "Employers had only one agreement amongst them and that was a mutual aid pact sharing costs to pay negotiations, security protection if a strike occurred and related. None of the parties entered into any agreement that would

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[10] The Distributors admit that the Distributors repeatedly lied and evaded in response to persistent questions and requests from the Union. (Petition, p. 5)

restrict their bargaining." (APX 151-162B; App. 174a-175a; App. 13a)

B. *The Board's Decision*

Trial in this case took place over approximately 60 days from November 16, 1992 through October 26, 1993. On December 1, 1994, Administrative Law Judge Benjamin Schlesinger issued his decision finding that each of the six Distributors committed unfair labor practices under Sections 8(a)(1) and (5) of the NLRA and that Respondent WCIRA violated Section 8(a)(1) of the Act by Long's December 6, 1990 death threat to Knox.

The ALJ found that the allegation of unlawful joint bargaining without Union consent was not time-barred by Section 10(b) of the Act for two separate and sufficient reasons: (1) the "closely related" doctrine; and (2) the fraudulent concealment doctrine. (App. 50a-58a; APX 32-35)

Under the "closely related" doctrine of *Redd-I, Inc.*, 290 NLRB 1115 (1988), the General Counsel may amend an existing complaint to add additional allegations of conduct which might otherwise have been barred if the new allegations are "closely related" to the existing allegations and if the new allegations occurred within the six months prior to the date the charge on the existing allegations was filed. The analysis includes an inquiry into whether the new allegations are of the same class, arise from the same factual setting and involve the same or similar defenses as the existing allegations in the outstanding complaint. The charges here were filed on April 3, 1991. Thus, October 3, 1990 was the statute bar date if the "closely related" doctrine applies.

The ALJ analyzed the facts under the "closely related" doctrine. He found that the allegations of joint bargaining in violation of Section 8(a)(5) were "closely related" to the existing allegations of bad faith bargaining in violation of Section 8(a)(5) in the outstanding complaint. Because

the "closely related" joint bargaining allegations (like the existing bad faith bargaining allegations) concern the Distributors' bargaining conduct on and after October 3, 1990, they were not time-barred. The outstanding complaint was properly amended to include these additional Section 8(a)(5) allegations.

> "I conclude that Respondents violated Section 8(a)(5) and (1) of the Act by bargaining in bad faith, clearly within the 6 months prior to the filing of the charges. . . ."

(App. 84a-85a and 50a-58a) His analysis of the timeliness issue could have ended there.

The ALJ also considered an alternative and additional theory for the timeliness of the allegations: the fraudulent concealment doctrine developed from *Ducane Heating Corp.*, 273 NLRB 1389 (1985), enf'd 785 F.2d 304 (4th Cir. 1986). The fraudulent concealment doctrine, if applicable, tolls the statute of limitations.

The ALJ reviewed the Distributors' acts of concealment on March 8, 1990, March 27, 1990, April 18, 1990, May 22, 1990, June 27, 1990, August 8, 1990, September 20, 1990, July 12, 1991 and July 6, 1992.[11] He considered and rejected the contention that the Union had not been diligent in its efforts to learn the truth about the existence and nature of the Pact. He noted that the Union had made repeated inquiries about the existence and nature of any joint bargaining agreement and had even (unsuccessfully) sought information about any Pact through an NLRB subpoena and through the examination of principal officers of two of the Distributors in a collateral NLRB proceeding in March of 1990. He also noted that the Union had filed charges on April 3, 1991; that the Union had appealed the Regional Director's June 20, 1991 dismissal of the joint bargaining allegations; that the joint bargain-

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[11] The Distributors' statement at page 8 that September 20, 1990 was "the last act of concealment" is incorrect. The ALJ found specific acts of concealment on and after September 20, 1990.

ing allegations remained pending until the General Counsel's July 28, 1992 denial of the Union's appeal; and that the other allegations of bad faith bargaining remained extant in the outstanding complaint. (App. 41a, n.1, 48a-50a) The ALJ found that the Distributors had engaged in affirmative lies (some under oath) as well as evasions and misrepresentations. He found that the Union had been diligent. The ALJ considered and rejected the argument that the Distributors' allusions to an "understanding" to engage in lawful coordinated bargaining or to "share" somehow excused their continued lies and evasions regarding the actual content of the Pact.

> "Even if Respondents had somehow hinted at the existence of the Pact in such a way that the Union should have divined its existence, Long and his cohorts certainly never gave any clue about its contents. The Union never knew, nor did the General Counsel. No one knew that the Pact prohibited each of the Respondents from bargaining directly with the Union or agreeing to terms and conditions which did not meet the minimums."

(App. 55a-56a)

With respect to the fraudulent concealment doctrine, the ALJ cited *District Lodge 64 v. NLRB*, 949 F.2d 441 (D.C. Cir. 1991) (*Brown & Sharpe I*), on remand, *Brown & Sharpe Mfg Co.*, 312 NLRB 444 (1993). (App. 56a, n.6) The D.C. Circuit decisions and the Board's decisions in *Brown & Sharpe*[12] set forth the accepted three-part test for fraudulent concealment:

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[12] The *Brown & Sharpe* case has a complex procedural history. *Brown & Sharpe Mfg. Co.*, 299 NLRB 586 (1990), remanded sub. nom. *District Lodge 64 v. NLRB*, 949 F.2d 441 (D.C. Cir. 1991) (*Brown & Sharpe I*), on first remand, *Brown & Sharpe Mfg. Co.*, 312 NLRB 444 (1993), remanded sub. nom. *Machinists District Lodge 64 v. NLRB*, 50 F.3d 1088 (D.C. Cir. 1995) (*Brown & Sharpe II*), on second remand, *Brown & Sharpe Mfg. Co.*, 321 NLRB 924 (1996), aff'd, *International Association of Machinists and Aerospace Workers District Lodge 64 v. NLRB*, 130 F.3d 1083 (D.C. Cir. 1997) (*Brown & Sharpe III*), cert. denied, —— U.S. ——, 118 S.Ct. 2319 (1998). In the final decisions in *Brown &*

> "The *Holmberg* doctrine, as described in *Fitzgerald* and as applied by the Board, has three critical agreements: (1) deliberate concealment has occurred; (2) material facts were the object of the concealment; and (3) the injured party was ignorant of those facts, without any fault or want of due diligence on its part."

The ALJ found a repeated pattern of affirmative lies and evasions regarding the existence and true nature of the Pact. He found that the fraudulent concealment doctrine applied to this case:

> 'I conclude that Respondents violated Section 8(a)(5) and (1) of the Act by bargaining in bad faith . . . since the opening of negotiations in March 1990, under the cloud of the fraudulently concealed pact."

(App. 84a-85a) The ALJ concluded that even if the "closely related" doctrine did not operate to make the amendment timely, the fraudulent concealment doctrine would operate to toll the statute of limitations here and render the amendment timely. The Distributors deliberately concealed material facts about the existence and terms of the Pact and the Union had been diligent in its efforts to discover the truth about the Distributors' secret joint bargaining agreement. (See App. 53a-58a)

As to the merits of the case, the ALJ analyzed the secret Pact—its penalty provision; its enforcement provisions; its 22 "minimum objectives"; its prohibition against direct bargaining with the Union. The ALJ analyzed the conduct of the parties in bargaining and reviewed established Board precedent. He concluded:

> "Although the Companies have an absolute right to seek the best agreement they can obtain and to cut

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Sharpe, the Board concluded and the D.C. Circuit affirmed that the first prong of deliberate concealment had not been met. There were no affirmative acts of deliberate concealment. It is clear that this three-prong test was accepted by the District of Columbia Circuit and reflects the view of the Board, the circuits (including the Sixth Circuit) and the Distributors here. The ALJ in the *Don Lee* case applied this correct legal standard.

> back costs and eliminate "restrictive" rules, they do not have the right, without the Union's consent, to engage in joint bargaining with the Union. What Respondents have done here is joint bargaining and nothing more."

(App. 74a, 58a-84a; APX 38-39) The ALJ found that by bargaining jointly without Union consent, the Distributors engaged in bad faith bargaining by their unlawful insistence on a non-mandatory bargaining subject (i.e., the scope of the bargaining unit). This was not lawful coordinated bargaining. The ALJ also found that WCIRA violated Section 8(a)(1) by Long's December 6, 1990 death threat to Knox.

On November 8, 1996, the National Labor Relations Board issued a unanimous decision and order. The NLRB corrected a few "inadvertent factual errors which do not affect the decision" (App. 25a, n.2) and affirmed the ALJ's rulings, findings and conclusion. (App. 25a) The Board affirmed the finding that the Distributors embarked on a secret scheme of joint bargaining without Union consent. The Board found that the Distributors entered into the Pact as part of their joint bargaining scheme; that the Pact, with its penalty provision, enforcement provisions, list of 22 "minimum objectives", prohibition on direct bargaining with the Union and other components, implemented a system of joint bargaining without Union consent; that the Distributors, by their words and deeds, lived by the secret Pact and in fact bargained jointly without Union consent; that in so doing the Distributors unlawfully insisted to impasse on a non-mandatory subject of bargaining (i.e., the scope of the bargaining unit); and that Fred Long's death threat constituted a violation of the Act in and of itself.[13] Bargaining was unlawful from its inception; and the February and April, 1991 unilateral implementations of massive cuts in wages and benefits were unlawful. (App. 24a-30a)

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[13] The ALJ and Board decisions also addressed additional issues which are not the focus of this Brief.

As to the timeliness issue, the Board reviewed and affirmed the ALJ's findings and conclusions on the application of the "closely related" doctrine and the fraudulent concealment doctrine. The Board, like the ALJ, found that each doctrine applied and that each doctrine provided a separate and independent ground for the timeliness of the amendment. (App. 29a-30a)

The Distributors filed a petition for review of the NLRB decision and order in the Court of Appeals for the Sixth Circuit. The Board filed a cross-petition for enforcement of the Board's decision and order. The Union was granted Intervenor status.

C. *The Sixth Circuit's Decision*

On June 2, 1998, the Sixth Circuit issued a unanimous decision of the panel enforcing the Board's order and denying the Distributors' petition for review. The Sixth Circuit noted that under *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 497 (1951), its standard of review was limited:

> "[W]e must enforce the NLRB's order as long as it is supported by substantial evidence on the record viewed as [a] whole, even if evidence also exists that possibly could support a conclusion different from the one reached by the NLRB."

(App. 15a) *See also* 29 U.S.C. § 160(e) and (f). The Distributors do not dispute that the "substantial evidence" test is the appropriate standard of review. However, their arguments demonstrate that they are actually asking for a much more than a "substantial evidence" review of the NLRB's order.

The Sixth Circuit decided three issues relevant here: (1) substantial evidence supported the Board's decision that the Distributors engaged in unlawful joint bargaining (and not lawful coordinated bargaining); (2) substantial evidence supported the Board's decision that the allegations of unlawful joint bargaining were timely due to the application of the "closely related" doctrine because un-

lawful bargaining occurred on and after October 3, 1990; and (3) even if the "closely related" doctrine did not apply, substantial evidence supported the Board's decision that the allegations of unlawful joint bargaining were timely due to the application of the fraudulent concealment doctrine. (App. 15a-22a) The Distributors do not petition for review of the first two holdings here.

In its review of the Board's application of the fraudulent concealment doctrine, the Sixth Circuit did not depart from the recognized three-part test for fraudulent concealment and did not create a new standard. The Sixth Ctrcuit did not hold that "an early concealment excuses later inaction without regard to the aggrieved party's actual state of knowledge or diligence in pursuing its rights." (Petition pp. 3, 11-12 and 15) There is no "split in the circuits" as a result of this decision.

It is important to note that the Sixth Circuit was not required, or even permitted, to conduct a *de novo* review of the numerous credibility and factual findings made below based upon the lengthy trial record in this case. The Distributors incorrectly assault the Sixth Circuit's decision for its alleged failure to catalog each and every factual finding with respect to the fraudulent concealment doctrine.[14] However, the Sixth Circuit did not (indeed

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[14] For example, the Distributors claim that the Sixth Circuit's "decision identified various acts of concealment from the Union that the court of appeals deemed sufficient to toll Section 10(b), the last one of which occurred in September 1990." (Petition, p. 10). This is not accurate. The Sixth Circuit did not attempt to catalog each and every lie and misrepresentation which showed that the Board was correct. In fact, the court stated that "we do not discuss the evidence in detail" and went on to cite examples and certain significant events. (App. 6a-11a, n.3, n.4, 31a-22a) ("*For example*, in March 1990 . . . ;" "*e.g.*, Long's statement to Knox . . . ;" and "*e.g.*, the statement of two Distributor representatives. . . .") (Emphasis added) Further, the Sixth Circuit never claimed that "the last act" of concealment occurred in September, 1990. The Sixth Circuit found that substantial evidence supported the Board's ruling that affirmative acts of deliberate concealment occurred repeatedly from March, 1990 until the Pact was produced on November 16, 1992.

under established precedent could not) conduct a *de novo* review of the Board's decision. The Sixth Circuit reviewed the facts underlying the rulings and found that substantial evidence supported the decision that the fraudulent concealment doctrine was applicable to this case.

The central question presented by the Petition is whether the accepted three-part test for the fraudulent concealment doctrine was applied here. The Distributors mischaracterize the Sixth Circuit's ruling on fraudulent concealment. The Sixth Circuit did not abandon the three-part test. (See Petition, p. 10; App. 21a) The Sixth Circuit reviewed the facts and legal analyses below (which had cited the authority confirming the accepted three-part test and which had applied the three-part test) and found that substantial evidence supported the decision that the fraudulent concealment doctrine applied. The Sixth Circuit noted specific examples of affirmative and deliberate acts of concealment of material facts by the Distributors (the first two prongs) (see App. 6a-15a, 19a-22a). The Sixth Circuit also noted the efforts of the Union in asking questions, subpoenaing documents, subpoenaing witnesses, taking testimony, requesting documents and information, filing charges and appealing charges, which were thwarted by the Distributors' lies and evasions. The court stated, "we bear in mind the critically important fact that the Distributors consistently refused to disclose the terms of the Pact until an exceedingly late date [November 16, 1992];" [h]ere, the facts could scarcely be stronger in support of the NLRB's finding . . .;" "[t]he Union repeatedly asked about the existence of a mutual aid pact . . .;" "[t]he Distributors' responses were generally evasive . . . and were sometimes downright untruthful;" "the Distributors kept the *terms* of the Pact a closely-held secret;" and "flagrantly misrepresented the Pact's terms. . . ." (App. 11a, 14a, 21a-22a) The Sixth Circuit specifically discussed the Distributors' contention that the Union failed to exercise sufficient diligence and rejected it in light of the record evidence to support the rulings below. (See App. 22a.)

While the Sixth Circuit may not have elaborately set forth each and every factual finding and each and every nuance of the development of the legal principles to the satisfaction of the Distributors, it is absolutely clear the Sixth Circuit's decision on the fraudulent concealment doctrine reviewed the record and found that substantial evidence supported the ruling below. The correct test was properly applied to the facts. The diligence of the Union was considered. The Sixth Circuit found that the fact that the Union had suspicions and eventually learned that some kind of agreement existed did not trigger the statute of limitations, because the Distributors continually lied and misrepresented the terms of the Pact. The Union never had sufficient information to divine "the *terms* of the Pact." (App. 10a-11a, n.3, 14a, n.6, 21a-22a)

The Distributors filed a petition for rehearing en banc. The Distributors' petition for rehearing en banc was circulated among the original panel members as well as among all active judges of the Sixth Circuit. On July 10, 1998, the petition was denied. (App. 106a-107a)

REASONS FOR DENYING THE WRIT

1. The ruling that the General Counsel's complaint allegations were not time-barred was supported by two separate and independent grounds: (1) the "closely related" doctrine; and (2) the fraudulent concealment doctrine. The Distributors' Petition does not challenge the ruling on the first ground. Even if the ALJ, Board and Sixth Circuit were all mistaken as to the application of the fraudulent concealment doctrine, the timeliness decision is fully supported by the unchallenged and legally sufficient "closely related" doctrine. There is no reason to grant the writ.

The Distributors acknowledge that both the ALJ and the Board found that the "closely related" doctrine applied (Petition, pp. 9-10, n.5). However, the Distributors ignore the fact that the Sixth Circuit not only affirmed the application of the fraudulent concealment doctrine,

but also affirmed the application of the "closely related" doctrine. Under either doctrine, the allegations were timely. (App. 3a, 11a, 14a n.6 and 19a-21a) The Distributors do not seek review of the Sixth Circuit's holding that the joint bargaining allegations are timely under the "closely related" doctrine.

Nevertheless, the Distributors drop a footnote in which they appear to argue that, even though they are not challenging the application of the "closely related" doctrine, they claim the application of that doctrine "does not justify the decision below." (Petition, pp. 9-10, n.5) This is simply incorrect. Under the "closely related" doctrine, the General Counsel may add allegations of unfair labor practices to previously-filed charges if they are "closely related" to existing charges in an outstanding complaint and if they occurred within six months prior to the date the existing charges were filed. Here, the existing charges were filed on April 3, 1991. Under the "closely related" doctrine, the General Counsel could later add allegations of "closely related" unfair labor practices which occurred within six months (October 3, 1990) of the date the existing charges were filed (April 3, 1991). Here, the ALJ reviewed the facts under the doctrine and made a specific finding that the unfair labor practices of unlawful joint bargaining did in fact occur in the time period on and after October 3, 1990 and were thus timely. (App. 84a-85a) The Board affirmed and adopted this conclusion. (App. 29a)

The Distributors argued to the Sixth Circuit that the Board's rulings on both the "closely related" doctrine and the fraudulent concealment doctrine were wrong. The Sixth Circuit reviewed and affirmed the Board's application of both doctrines. (App. 19a-21a) As to the "closely related" doctrine, the court said, "it is undisputed that the alleged unfair labor practice . . . occurred within six months of the date on which the original charge was filed, and therefore we are not persuaded by the Distributors' primary [closely related] argument." (App. 20a) The

Sixth Circuit rejected the Distributors' argument that the joint bargaining allegations were not "closely related" to the existing bad faith bargaining charges in the outstanding complaint. (App. 20a)

The Distributors' statement that "the Board never conducted such an analysis here" (Petition, p. 10, n.5) with respect to the "closely related" doctrine is wrong. The Sixth Circuit specifically addressed those arguments by the Distributors and rejected them. The holding of the Sixth Circuit that the "closely related" doctrine provides a separate and legally sufficient basis for the timeliness of the joint bargaining allegations is not challenged by the Distributors' Petition and remains as an independent ground for the holding that the joint bargaining allegations were not time-barred.

The cases cited by the Distributors in footnote 5 have no application to the "closely related" doctrine. However, even if the Distributors' statements in footnote 5 were correct—and they are not—whatever complaints the Distributors might have about the "closely related" doctrine are irrelevant in view of their acknowledgement that they are not challenging the holdings below that the "closely related" doctrine provides an independent basis for the finding that the allegations were not time-barred. Indeed, some of the cases cited by the Distributors underscore the conclusion that the "closely related" doctrine is a sufficient basis to support the timeliness of the joint bargaining allegations.

In *Truck Drivers & Helpers Union Local 170 v. NLRB, (Girardi Distributors),* 993 F.2d 990, (1st Cir. 1993) (cited by the Distributors), the ALJ and the Board held the fraudulent concealment doctrine did not apply because there was no repeated deliberate concealment (as to the first prong) and the union failed to prove diligence (the third prong. They also held that the "closely related" doctrine did not apply. On review, the First Circuit found that substantial evidence supported the fraudulent concealment finding but did not support the "closely related"

ruling. The First Circuit remanded for a trial on the merits. This case actually underscores the reason why the Petition here could be denied; because even if the fraudulent concealment doctrine did not apply, the "closely related" doctrine did.

In *North American Rockwell Corp. v. NLRB*, 389 F.2d 866 (10th Cir. 1968) (cited by the Distributors), the General Counsel invoked a "closely related" doctrine to raise allegations which would otherwise be untimely. The ALJ and the Board agreed and the Tenth Circuit affirmed. The case did not allege or involve the fraudulent concealment doctrine. *See also Sioux City Foundry, Co. v. NLRB*, 154 F.3d 832 (8th Cir. 1998) (where union continued to pursue its appeal of the Regional Director's dismissal, the statute did not run).

In short, any review of the Sixth Circuit's application of the fraudulent concealment doctrine by writ of certiorari would not affect the disposition of this case because the joint bargaining allegations were "closely related" to the existing allegations in the outstanding complaint.

2. The Sixth Circuit's decision upholding the Board's ruling on the fraudulent concealment doctrine conforms with the three-part standard which has consistently been applied by the Board, the Sixth Circuit and all other circuits. The Distributors' characterization of the Sixth Circuit's decision is inaccurate. Their contention that the Sixth Circuit departed from existing law is false.

As the above discussion of the ALJ and Board decisions makes clear, the Sixth Circuit did not invent a new standard for the application of the fraudulent concealment doctrine. Under the doctrine of fraudulent concealment, the statute of limitations is tolled where:

(1) deliberate concealment has occurred;

(2) material facts were the object of the concealment; and

(3) the injured party was ignorant of those facts, without fault or want of due diligence on its part.

Brown & Sharpe Mfg. Co., 312 NLRB 444 (1993); *Brown & Sharpe Mfg. Co.*, 321 NLRB 924 (1996) (citing *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), and *Fitzgerald v. Seamans*, 553 F.2d 220 (D.C. Cir. 1977)); *International Association of Machinists v. NLRB*, 130 F.3d 1083, 1087 (D.C. Cir. 1997) (*Brown & Sharpe III*). *See also Hill v. U.S. Department of Labor*, 65 F.3d 1331, 1335 (6th Cir. 1995) (quoting *Dayco Corp. v. Goodyear Tire and Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975)).

If the fraudulent concealment doctrine applies, "the limitations period begins to run when the charging party knows or should have known of the concealed facts." *Ducane Heating Corp.*, 273 NLRB 1389 (1985), enf'd 785 F.2d 304 (5th Cir. 1986). This standard was used by the ALJ in this case. (See App. 56a, n.6) The Board affirmed and the Sixth Circuit found that substantial evidence supported the Board's decision.

The Distributors agree that this three-part test is the appropriate test to apply to this case.[15] They do not challenge the findings that the Distributors in fact engaged in repeated and affirmative acts of deliberate concealment (the first prong) and that material facts were

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[15] In fact, the additional cases cited by the Distributors use the same three-part test. *See e.g., Brown & Sharpe Mfg. Co.*, 312 NLRB 444 (1993), on remanded, sub nom. *Brown & Sharpe II*, 50 F.3d 1088 (D.C. Cir. 1995). *Brown & Sharpe Mfg. Co.*, 321 NLRB 924 (1996), aff'd. *Brown & Sharpe III*, 130 F.3d 1083 (D.C. Cir. 1997) (although the issue in dispute in these cases were the first and second prongs and not the third prong); *NLRB v. O'Neill*, 965 F.2d 1522, 1527 (9th Cir. 1992) (the fraudulent concealment doctrine operated to toll the statute; the allegations were timely); *Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977) (facts showed that as to former employee's claim against the Department of Defense, there was no deliberate and repeated concealment, he was on actual notice of all the material facts and the statute had run).

the object of the concealment (the second prong). However, they claim that the Board and the Sixth Circuit did not apply the diligence test (the third prong) to the facts here and that "as a matter of law" the Union failed to exercise reasonable diligence. (Petition, p. 16)

The Distributors contend that the Sixth Circuit's decision with respect to fraudulent concealment is "contrary to guidance from this Court regarding applicability of the fraudulent concealment doctrine to all federal statutes." (Petition, p. 12) This is not correct. The Distributors cite two United States Supreme Court cases with respect to fraudulent concealment and both cases support the decision of the Sixth Circuit here.

In *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), the district court found that a suit which was filed more than 10 years (the statute) after the actionable events took place was nonetheless timely. The Second Circuit reversed. The Supreme Court found that under the equitable doctrine of fraudulent concealment, the statute of limitations had been tolled and the suit was timely. The Court spoke to a diligence requirement, but also indicated that "equity eschews mechanical rules; it depends on flexibility." "If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time." "Equity will not lend itself to such fraud." 327 U.S. at 396-97. The Sixth Circuit's review here of the findings below of deliberate, affirmative concealment and the Union's efforts to discover the truth is not in conflict with *Holmberg*.

The Distributors also cite *Machinists Local 1424 v. NLRB (Bryan Manufacturing Co.)*, 362 U.S. 411 (1960), (Petition, p. 12) to support their contention that the Sixth Circuit has departed from Supreme Court precedent on fraudulent concealment. In *Bryan Manufacturing Co.*, there was no claim of fraudulent concealment involved. In fact, footnote 19 states *"it need hardly be pointed*

out that we are not dealing with a case of fraudulent concealment alleged to toll the statute." 362 U.S. at 429, n.19 (emphasis added). There was also no claim that the "closely related" doctrine applied. This case provides some general rules about the statute of limitations, but is not in conflict with the Sixth Circuit's decision.

The Sixth Circuit's decision is also not in conflict with *Brown & Sharpe II,* 50 F.3d 1088 (D.C. Cir. 1995). In that particular ruling, the issue was the Board's application of the materiality prong (the second prong). There was no diligence (third prong) issue. Similarly, the Sixth Circuit's decision here is not in conflict with the decision in *Brown & Sharpe I,* 949 F.2d 441, 449 (D.C. Cir. 1991). (Petition, p. 18) In *Brown & Sharpe I,* the D.C. Circuit remanded a surface bargaining case to the Board so that it could set forth a definitive test regarding the application of the fraudulent concealment doctrine from *Ducane Heating Corp.* There was no finding in that decision regarding diligence. On the remand after this decision, the Board adopted the three-part standard cited herein. In the end, the ruling was that the first prong (deliberate concealment) was not met. There was no ruling as to the third prong in the *Brown & Sharpe* decisions.

Here, charges were filed by the Union on April 3, 1991. The joint bargaining aspect of those charges was pending from April 3, 1991 through at least July 28, 1992. Other aspects of those charges went to complaint and were still pending as of February, 1993. On July 28, 1992, after receiving Long's July 6, 1992 letter (App. 172a-175a), the Office of Appeals denied the Union's appeal and affirmed the dismissal as to the joint bargaining allegations of the April 3, 1991 charges. On November 16, 1992, the Pact was finally produced and disclosed. The Regional Director sought permission from the General Counsel to revoke his previous partial dismissal of the unlawful joint bargaining allegations. The Distributors were afforded an opportunity to present their position(s). (APX 106, para. 4) On January 22, 1993 (less than six months after July

28, 1992), the General Counsel reinstated the joint bargaining allegations of the April 3, 1991 charges. On January 27, 1993, the General Counsel filed the motion to amend the complaint. On February 18, 1993, the ALJ granted that motion.

A pattern of individual acts of affirmative and deliberative concealment occurred on March 8, 1990, March 27, 1990, April 18, 1990, May 22, 1990, June 27, 1990, August 8, 1990, September 20, 1990, July 12, 1991, July 16, 1991 and July 6, 1992, until production of the Pact on November 16, 1992.

Even before the fraudulent concealment doctrine or the "closely related" doctrine is considered, the facts here show that the allegations were timely: the allegations of the February 18, 1993 amended complaint were "based upon . . . unfair labor practice[s] [i.e., joint bargaining as bad faith bargaining] occurring" within "six months [i.e., October 3, 1990] prior to the filing of the charge [i.e., filed on April 3, 1991]." See 29 U.S.C. § 160(b). However, to the extent the reinstatement of the allegations on January 22, 1993 is the relevant "filing" date rather than April 3, 1991, the fraudulent concealment doctrine properly applies here to toll the statute of limitations so that it had not yet run as of January 22, 1993, January 27, 1993 or February 18, 1993.

First, neither the Pact itself nor its terms were disclosed until November 16, 1992 and the charges were reinstated on January 22, 1993 (within six months thereafter). The statute was tolled from March, 1990 through November 16, 1992 and began running on November 16, 1992.

Second, while the Union had suspicions, the Union did not have actual knowledge of the terms of the Pact or the type of pact involved here until November 16, 1992. The statute was tolled until November 16, 1992 and began running on November 16, 1992.

Third, even though the Union had mistrust and suspicion, they were not sufficient to impart "constructive notice" to the Union of the unlawful terms of the secret agreement. The Distributors contend that the Union could have, with reasonable diligence, discovered the terms of the Pact and should have "divined" that the "understanding" was in fact the type of Pact here. However, that argument was specifically rejected below and is contrary even to the authority cited by the Distributors. *See e.g., Hobson v. Wilson*, 737 F.2d 1, 39, 40 (D.C. Cir. 1984) (mere "suspicions cannot conceivably constitute notice of possible . . . violations, without creating the anomalous situation of requiring persons to file suit on a hunch. . . .").

Fourth, the Union acted to pursue its rights diligently during the period of concealment from March, 1990 until the Pact was produced on November 16, 1992. The Union subpoenaed documents, subpoenaed witness testimony, asked questions, requested documents and information, filed timely charges on April 3. 1991 and appealed the partial dismissal. The Union did not sit on its rights. The Union took these steps in the face of the Distributors' affirmative, repeated and deliberate lies and evasions.

Fifth, tolling of the statute did not end by the end of July 12, 1991 and then run by the end of January, 1992, as the Distributors claim. (Petition, p. 18) July 12, 1991 is the date of the bargaining session where Thomas purportedly admitted the existence of some kind of pact. In fact, however, Thomas testified that as of July 12, 1991, the only written agreement which he knew of was a "fee schedule." (APX 2125, 2137; App. 169a-171a) Shortly thereafter, when the Union reiterated its need for a copy of any agreement describing the bargaining relationship between the Distributors, Thomas asserted attorney-client privilege and irrelevance. (App. 10a; 54a-55a) Moreover, this argument ignores the fact that the Union was actively pursuing the joint bargaining allegations during the time period from at least April 3, 1991 through at least July 28, 1992. Further, this argument ignores the fact that

Long's July 6, 1992 letter to the General Counsel's Office of Appeals (App. 172a-175a) affirmatively and flagrantly further misrepresented the existence and the terms of the alleged "cost sharing" agreement. The fact that the Union or General Counsel might have learned that some type of agreement existed which was repeatedly misrepresented is not sufficient to bar tolling here. (See App. 49a-50a, 53a-58a; 10a-11a, n.3, 13a, 19a-22a)

In sum, there is no "split in the circuits" as a result of the Sixth Circuit's decision in this case. As *Hill v. U.S. Department of Labor*, 65 F.3d 1331, 1335 (6th Cir. 1995), demonstrates, the Sixth Circuit has historically utilized the generally-accepted three-part test for application of the fraudulent concealment doctrine. The same test was applied here, and the Sixth Circuit's decision that the rulings below were supported by "substantial evidence" was proper.

The cases cited by Distributors use the same three-part test, although the facts of each case dictated varying results. For example, in *Gardner v. International Telegraph Employees Local 9*, 850 F.2d 518, 523 (9th Cir. 1988), the court of appeals found that as to one claim, there was no deliberate concealment (the first prong) and thus no tolling. As to another claim, the court of appeals found that the case should be remanded to ascertain facts (which were not in evidence) about when the plaintiff learned his contract had a grievance procedure. Here, there are abundant facts in evidence about the Union's requests, suspicions and state of knowledge to support the ruling that there was substantial evidence that the Union satisfied the third prong.

In *Jensen v. Snellings*, 841 F.2d 600 (5th Cir. 1988), two investors sued their attorney and broker (among others) under securities laws. The plaintiffs argued that the statute should be tolled. The district court held that the statute was tolled until plaintiffs had notice of the requisite facts, but that the suit was nonetheless untimely because they had not sued within two years (the statute

period) of the date their new attorney informed them of the misconduct of the defendants. The court of appeals affirmed. This case does not use a different standard. It simply involves different facts and claims.

John Morrell & Co., 304 NLRB 896 (1991), aff'd, 998 F.2d 7 (D.C. Cir. 1993) also does not evidence any "split" with the Sixth Circuit. In that case, the statute was tolled (due to fraudulent concealment) up until the point the union had facts and was on notice that the employer's motive for its actions was suspect when a magistrate in another proceeding disclosed the company's suspect scheme to rid itself of the union. The union there had sufficient "material" facts long before it filed its charge. Here, the Distributors' "motive" is not the issue but rather their agreement and actions. The Pact is not simply "motive" evidence of unlawful and continuing conduct which was deliberately concealed until November 16, 1992.

The Sixth Circuit's enforcement of the Board's decision here is also not in conflict with *Landry v. Air Line Pilots Association*, 901 F.2d 404 (5th Cir. 1990). In *Landry*, there was no proof of deliberate concealment by the union of the material facts. The plaintiffs were on actual notice or "inquiry notice" of the facts and there was no proof of "active concealment." This is a decidedly different factual scenario than the present case in which there is abundant uncontested evidence of repeated, affirmative and deliberate acts of concealment. Further, this case does not apply a test different from that of the Sixth Circuit here.

CONCLUSION

For the foregoing reasons, Intervenor Teamsters Local 1038 requests that the Distributors' Petition be denied.

Respectfully submitted,

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Dated: December 16, 1998

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 96-6704; 97-5140

DON LEE DISTRIBUTOR, INC. (WARREN); DON LEE DISTRIBUTOR, INC. (DEARBORN); POWERS DISTRIBUTING COMPANY, INC.; EASTOWN DISTRIBUTORS, CO.; HUBERT DISTRIBUTORS, INC.; and OAK DISTRIBUTING CO.,
Petitioners/
Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/
Cross-Petitioner,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 1038,
Intervenor.

On Petition for Review and Cross-Application
for Enforcement of an Order of the
National Labor Relations Board

Nos. 7-CA-31719(2)-(7), 7-CA-32164(1), 7-CA-32896,
7-CA-32986, 7-CA-33649, 7-CA-33707, 7-CA-31302

Argued: March 19, 1998
Decided and Filed: June 2, 1998

Before: BOGGS, NORRIS, and MOORE, Circuit Judges.

OPINION

BOGGS, Circuit Judge. This case comes to us on the petition of six Detroit-area beer distributors (collectively, "Distributors") to review an order of the National Labor Relations Board ("NLRB") finding that the Distributors committed unfair labor practices in violation of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("NLRA"), and on the NLRB's cross-petition for enforcement of its order. We are confronted with two issues: first, whether the Distributors' conduct during collective bargaining sessions with the union representing their employees constituted unlawful "joint" or "multi-employer" bargaining, or merely constituted permissible "coordinated" bargaining; and second, whether the NLRB was time-barred from pursuing a claim against the Distributors based on unlawful multiemployer bargaining.

I

The Distributors are wholesale beer distributors operating in the Detroit area. Each of the six Distributors is separately owned and operated, except that Don Lee Distributor, Inc. (Warren) and Don Lee Distributor, Inc. (Dearborn), are both owned by a single parent company. The employees at each of the Distributors comprise separate bargaining units. For many years, the Distributors' drivers, warehouse employees, and reclamation employees have been represented for collective bargaining purposes by Local 1038, International Brotherhood of Teamsters, AFL-CIO ("Union"). In 1987, the Distributors joined forces with other beer distributors in the area to form the Downriver, Detroit, Oakland, and Macomb Wholesalers Association, Inc. ("DDOM") in an effort to negotiate more favorable terms with their respective groups of em-

ployees. Their efforts through the DDOM were unsuccessful; after a 12-week strike, the Distributors—apparently confronted with something of a "Prisoner's Dilemma"—were left to the "mercy of other . . . wholesalers" as several other DDOM members made individual deals with the Union on terms more favorable to the Union than the Distributors and other DDOM members originally had anticipated.

Dissatisfied with their DDOM experience, the Distributors decided in January 1990 to withdraw from the association. Executives of each of the Distributors had met in December 1989 wit Fred Long, the chief executive of a labor-relations firm called West Coast Industrial Relations Association, Inc. ("West Coast"), to discuss alternative ways of bargaining together to increase their bargaining power relative to the Union. Long told the Distributors that the problem with the 1987 DDOM negotiation was that the structure of DDOM permitted the Union to "whipsaw" DDOM members in the collective bargaining process.[1] To combat the whipsawing problem, Long advised the Distributors to enter into a mutual aid pact ("Pact") that provided, in pertinent part, as follows:

1. Each Distributor shall enter into its own Agreement with the Union. Nothing contained herein shall be construed to reflect a multi-employer association nor create a multi-employer unit. This

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[1] "Whipsawing" is a "union stratagem seeking to obtain benefits from a number or group of employers by applying pressure to one, the objective being to win favorable terms from the one employer and then use this as a pattern, or perhaps a base, to obtain the same or greater benefits from the other employers, under the same threat of pressure (including a strike) used against the first one." *See* ROBERTS DICTIONARY OF INDUSTRIAL RELATIONS (rev. ed. 1971); *see also* WEBSTER'S THIRD NEW INT'L DICTIONARY (1986) ("3: to use more favorable terms gained (as in one company) as the precedent or leverage to win equal or greater concessions from (as a related company).").

document reflects a coordinated bagaining effort among individual and independent Distributors.

2. Each Distributor shall share costs and expenses of Fred R. Long and his associates who shall represent the Distributors['] bargaining efforts with the Union . . . .

* * *

7. Distributors agree to the establishment of the minimum objectives, described in Exhibit B, for a new Collective Bargaining Agreement which can only be changed by a majority vote of the participating Distributors.

8. In the event any Distributor is in breach of this Agreement or negotiates directly with the Union (or any other Union or person or group who allegedly is representing this Union's Interest) or agrees to settle on terms and conditions in excess of those listed in item 7 herein above, that Distributor, in addition to any other damages for breach of this Agreement that may occur in any enforcement law suit brought by any of the other Distribuotrs shall, in addition, pay to each of the other Distributors a penalty fee of $400,000 to each.

The "minimum objectives" mentioned in Paragraph 7 of the Pact, which vary markedly in relative specificity, were listed as follows:

1. Eliminate eight (8) hour minimum/maximum day.
2. Remove load limit.
3. Overtime after forty (40) hours per week.
4. Management rights clause.
5. More restrictive grievance procedure.
6. Single pay holidays.

7. Simplified vacation language.
8. Four (4) weeks maximum vacation, red circle everyone over.
9. Cooler and basement deliveries required.
10. Reduction in wages.
11. Refined benefit pension plan—percentage of earnings.
12. Insurance revisions.
13. No curfew.
14. Bulk deliveries.
15. Zipper clause.
16. Empty pick up rate.
17. Longer probation period.
18. No restrictions on number of part-time employees.
19. Reduction on commission when helper is used.
20. More flexibility with reclamation duties.
21. Common expiration date.
22. Minimum three year contract.

On January 18, 1990, the Distributors signed the Pact.

As the existing DDOM contract was set to expire in May 1990, the Distributors and the Union began making plans for a new round of collective bargaining in March 1990. Early on, Long's associates (on behalf of the Distributors) broached the idea of "joint' or "concurrent negotiations," but Robert Knox, the president of the Union and the chief Union negotiator, initially rejected this idea. On March 27, 1990, the Distributors and the Union held an initial meeting to discuss collective-bargaining issues. At this meeting, Long presented a memorandum to Knox detailing the Distributors' initial position. This memoran-

dum stated that "the bargaining positions of each [Distributor] are the same and any proposal I offer for any one of them will be identical for the others for delivery department and warehousing department personnel representing the bulk of each bargaining unit." On the other hand, the memorandum also stated that "[i]t may also develop through the negotiating process even for delivery department or warehouse department personnel, that it is advantagous for a certain company and the union to agree on a provision not acceptable to other companies or the union. Although the companies do not contemplate such differences, it is possible they may develop as issues are discussed. Such agreed upon differences, if any, would be incorporated into that company's contract."

At the March 27 1990, meeting between the Distributors and the Union, Knox specifically asked Long whether the Distributors had entered into any kind of mutual aid pact. Instead of disclosing the existence and terms of the Pact, Long replied that the possible existence of a mutual aid pact was "none of his business and that it was not relevant to bargaining." Long did volunteer, however, that the Distributors had *not* pledged to negotiate exclusively through Long and that they could "retain someone else without penalty." Faced with Knox's reluctance to participate in any "joint" or "concurrent' bargaining, Long told Knox that if the Union insisted on separate bargaining, Long would conduct the bargaining session for one of the Distributors, after which a representative of one of the Distributors would insist on identical contract terms for each of the other five Distributors. Rather than participate in such a futile endeavor, Knox agreed to try the joint bargaining approach and "see how it progressed."

The first actual bargaining session was held on April 18, 1990. On that date, the parties exchanged initial proposals. Long presented six identical proposals, one for each of the Distributors. Knox therefore asked again whether there was an association or other collective under-

standing among the Distributors. Long again refused to answer and stated that "that wasn't an appropriate subject for bargaining." Bargaining continued, with little progress, through April and most of May 1990.[2] At a bargaining session held on May 22, 1990, the question of whether the Distributors were engaging in joint bargaining came up again, and again Long gave a somewhat evasive answer that suggested that certain Distributors could well end up agreeing to different contract terms. Despite this response, on June 8, 1990, Long wrote to Knox making clear that the Distributors would have a common, identical position on all major subjects of collective bargaining: Long stated that "[*w*]*e* are coming close to having everything *we* need to refine *our* first proposal next week. . . . *We* will have our position on this issue refined soon. . . . [*O*]*ur* economic package, as it may develop in negotiations, will be conditioned on resolution of non-economic language and specifically elimination of restrictive provisions *we* define as featherbedding." (emphasis added). Sure enough, at the June 19, 1990, bargaining session, the Distributors once again presented six identical proposals, one for each Distributor.

In the late June and early July 1990 bargaining sessions, the Union representatives began insisting on separate bargaining. The Distributors vigorously resisted this idea, stating through Long at one point that "[t]he contract for all the distributors we represent is essentially identical . . . . [W]e believe that this ploy . . . represents nothing more than yet another dilatory tactic on your part." Nonetheless, the Union went forward with its plan, identifying specific issues unique to particular Dis-

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[2] Tellingly, on April 20, 1990, the Distributors sent a joint letter to their retail customers with numerous collective references: "our contract," "we are asking the union to eliminate featherbedding practices," and the like. They also formed a collective group called the Coalition for Job Preservation, publishing letters in local newspapers to similar effect.

tributors. For example, on July 16, 1990, the Union presented a comprehensive proposal covering only the Powers Distributing Co. bargaining unit. On July 18, 1990, the Union proposed implementing a "daily route bidding system" at Don Lee (Dearborn). In response to these individualized proposals, the Distributors incongruously responded with six identical counterproposals—even though the Union had made no proposal with respect to four of the six Distributors. On August 8, 1990, after the Distributors mysteriously made identical counterproposals despite the uniqueness of the Union's two Distributor-specific proposals, the Union requested that Long's associate, Chris Thomas, provide a copy of all documents showing the relationship between West Coast and the Distributors. Thomas refused to provide the requested documents, stating that they were confidential.

On September 5, 1990, Thomas informed the Union that the Distributors' counterproposals on the route-bidding issue—the issue raised by the Union only with respect to one of the Distributors—were withdrawn because the Union had not responded to them. On September 11, 1990, West Coast transmitted what it called the Distributors' final offer, making clear that the Distributors were presenting "complete and identical" offers. At the same time, West Coast declared an impasse because of the apparent futility of further negotiations over such issues as compensation for drivers and co-payment of health care premiums. At the next bargaining session, on September 20, 1990, Knox specifically asked the Distributors whether there was "a written or oral document that binds you distributors together in any way." Two different Distributor representatives specifically said that there was no pact of any kind among the Distributors.

Between October 1990 and January 1991, several bargaining sessions were held at which the Union attempted to get the Distributors to consider Union proposals that

raised issues unique to particular Distributors. The Distributors essentially rejected these overtures, continuing to assert that the Distributors had identical positions on all issues. Finally, on January 14, 1991, Thomas sent Knox a letter by certified mail stating:

> Mr. Knox, *we are at impasse at Eastown, Don Lee Pontiac, Don Lee Dearborn, Oak, Powers, and Hubert.* Each has the same identical position on the ten (10) key items herein noted amongst others. If there is no agreement on these ten (10) items, there can be no agreement with any of them.

On January 30, 1991, the Distributors simultaneously notified the Union that they would unilaterally implement the non-economic portions of their final offer on February 7, 1991. On April 10, 1991, the Distributors notified the Union that they would implement the economic portions of their final offer on April 15, 1991.

The parties held another bargaining session on July 12, 1991. At this session, an attorney for the Union requested production of any document "that spelled out the employers' relationship to each other for purposes of collective bargaining." The Union's attorney also specifically asked whether "there were any penalty provisions amongst the distributors." Thomas, representing the Distributors, declined to provide the requested information. Thomas later took the position that the Pact was subject to the attorney-client privilege because Long (whose signature does not appear on the Pact) is a member of the Michigan bar.[3]

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[3] We recognize that the record contains some evidence suggesting that West Coast disclosed at least the existence of some kind of agreement early in the negotiations. For two reasons, we do not discuss this evidence in detail. First, in reviewing the NLRB's order our only task is to ascertain whether substantial evidence supports the order, and not to irrespective of whether there is evidence that could support a contrary conclusion. *See Universal*

Several months later, two individual distributors unilaterally changed the conditions of employment for Union members in ways that are contested in this case. In November 1991, Don Lee (Dearborn) changed its drivers' routes based solely on the drivers' performance, without regard to seniority, and without the opportunity to bid on routes that had been respected under the 1987 DDOM contract. In July 1992, Powers Distributing informed its drivers that it would discipline any driver who returned an improperly filled empty can collection bag, referred to by the Union as Powers's new "can bag" policy), despite the fact that under the 1987 DDOM contract drivers were not penalized for inadvertently returning less-than-full bags of aluminium cans for recycling.

II

Because the Distributors assert a limitations defense, we find it useful to summarize in detail the procedural history of this case; in doing so, we bear in mind the critically important fact that the Distributors consistently refused to disclose the terms of the Pact until an exceedingly late date.[4]

Camera Corp. v. NLRB, 340 U.S. 474 (1951). Second, the disclosure of the *existence* of the Pact is immaterial to the legality of the Distributors' conduct. As explained below, an agreement providing for coordinated bargaining is perfectly lawful, while one that provides for multiemployer bargaining without the Union's consent is a violation of the NLRA. Thus, the question is whether the Distributors disclosed the *terms* of the Pact, not merely whether the Distributors disclosed its existence.

[4] For example, in March 1990 (three months after the Distributors entered into the Pact), one of the Distributors failed to produce a copy of the Pact in response to a subpoena that requested "[a]ny and all documents . . . pertaining to the Employer's membership or participation in *any* employer association or to the Employer's assignment of bargaining and/or representational rights and/or responsibilities to any such employer association or entity or individual including West Coast Industrial Relations, Fred

The charge at issue in this case was filed by the Union on April 3, 1991. The charge alleged simply that "[i]n the six months prior to the filing of this Charge, the Employer[s] ha[ve] violated Section 8(a)(5) of the [National Labor Relations] Act by bargaining in bad faith and by, on or about February 4, 1991, unilaterally implementing terms and conditions of employment prior to reaching a *bona fide* impasse." On June 20, 1991, the Regional Director of the NLRB declined to issue a complaint with respect to the Union's allegations. In particular, the Regional Director concluded that there was no evidence that the Distributors had unlawfully engaged in multiemployer bargaining without the Union's knowledge or consent:

> The investigation revealed that above six Employers all secured the services of the same labor relations consulting firm to represent them in their efforts to reach agreement with the Charging Union regarding a collective bargaining agreement. The Employers admittedly sought the same contract language and bargained to that end.
>
> The parties met regarding each of the six companies on a rotating basis. There is no evidence that the Employers wished to change the scope of the six individual units or combine them into one unit. Nor is there any evidence that, in the event an overall agreement is reached, that the Employers intend not to bargain individually over issues which might pertain to each respective company. I conclude that the Employers are permitted to bargain in a group with a single representative of their choice and to negotiate for identical language in their collective bargaining agreement with the Charging Union.[5]

Long, Patrick Jordan, or the firm of McLaughlin and Irvin from January 1, 1988 to the present."

[5] The Union, as intervenor, has opposed the Distributors' motion to take judicial notice of the Regional Director's decision, although

In reaching this decision, the Regional Director did not have the benefit of seeing the text of the Pact.

The Union appealed the Regional Director's refusal to issue a complaint based on the Distributors' alleged unlawful multiemployer-bargaining practices. In connection with this appeal, Long wrote a letter to the NLRB's Office of Appeals in which he stated that, while the Distributors did have a "mutual aid pact," it was solely for the purpose of sharing the cost of negotiations and contained no provision "that would restrict [the individual Distributors'] bargaining." On July 28, 1992, the Office of Appeals sustained the Regional Director's decision, stating that "the evidence was insufficient to meet the burden of establishing that [the Distributors] had entered into an agreement to restrict separate agreements by the parties or that [the Distributors] had attempted to combine all the bargaining units into one unit." The record before the Office of Appeals did not include a copy of the Pact.

Notwithstanding his initial refusal to file a complaint, on July 26, 1991, the Regional Director did issue a complaint challenging two specific aspects of the Distributors' February 1991 actions: their imposition of a longer probationary period for new employees, and their new classification of "casual" employees. Shortly thereafter, the Regional Director amended the complaint to challenge the legality of the Distributors' unilateral implementation of its economic proposals in April 1991 without first reaching a bona fide impasse.

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the NLRB has not (and, indeed, has stipulated to its authenticity). Pursuant to Fed. R. Evid. 201, we have held that it is appropriate to take judicial notice of "adjudicative facts" such as agency and judicial decisions, even where those decisions contain disputed statements of fact, as long as we take judicial notice for some purpose other than to take a position on the disputed fact issue. *See, e.g., United States v. Garland*, 991 F.2d 328, 332 (6th Cir. 1993).

The Distributors did not produce a copy of the Pact until the beginning of the administrative hearing in this matter (on November 16, 1992), after a subpoena had been issued for its production. Shortly thereafter, the General Counsel moved to amend the complaint to allege that the Pact,

> which was concealed from the Union, was actually an agreement forming "a de facto multi-employer association and/or bargaining coalition" and that from March 27, 1990, the first negotiating session, [the Distributors] bargained illegally as a multi-employer association or engaged in coalition bargaining, without the Union's consent. Thus, no valid impasse was reached. Furthermore, [the Distributors'] multiemployer or coalition bargaining was "bad faith and/or surface bargaining," but only from October 3, 1990, which was 6 months prior to the filing of the charge.

Over the Distributors' objection, the administrative law judge ("ALJ") granted the General Counsel's motion to amend the complaint.[6]

After a lengthy hearing, the ALJ ruled in favor of the General Counsel in an opinion dated December 1, 1994. The ALJ found that the Pact created an unlawful multi-employer bargaining collective that rendered the entire course of the Distributors' conduct toward the Union unlawful. Accordingly, the ALJ ordered "that all Respondents . . . rescind the February 7 and April 15, 1991 im-

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[6] Among other things, the Disitributors argued that the proposed amendment was time-barred by the six-month limitations period applicable to charges of unfair labor practices under the NLRA. The ALJ concluded that the amendment was not time barred, both because the Distributors had fraudulently concealed the existence and substance of the Pact, and because the multiemployer-bargaining allegation was closely related to the original allegations of the complaint.

plementations of the last, best, and final offers and restore all terms and conditions of employment to the status quo before the unilateral changes, to the extent that such were detrimental to its employees. That includes eliminating the new casual employee classification and probationary employee clause and making whole those employees who were affected by Respondents' illegal implementations. . . . I shall order Powers to remove that discipline [for violation of the new "can bag" policy] from the employees' personnel files . . . ."

In a decision and order dated November 8, 1996, a three-member panel of the NLRB essentially adopted the reasoning and order of the ALJ. The Distributors' petition for review, and the NLRB's cross-petition for enforcement, followed shortly thereafter.

III

It is particularly appropriate, in light of the parties' radically divergent views of the record evidence, to emphasize before addressing the merits of this case that we must enforce the NLRB's order as long as it is supported by substantial evidence on the record viewed as whole, even if evidence also exists that possibly could support a conclusion different from that reached by the NLRB. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 497 (1951).

A

The NLRA requires employers to bargain in good faith with the designated representative of a defined bargaining unit of the employer's employees. *See* 29 U.S.C. § 158 (a)(5). The duty to bargain in good faith is limited to issues of wages, hours, and other terms and conditions of employment—the so-called mandatory subjects of bargaining. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210 (1964). However, when a party so strenuously refuses to bargain on a nonmandatory subject (such

as the scope of the bargaining unit) that the result is an impasse, that party violates Section 8(a)(5) of the NLRA. *See NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 348-50 (1958).

Following the principle that an impasse caused by absolute insistence on a particular bargaining unit is a violation of the duty to bargain in good faith, the NLRB and the courts have held that "joint bargaining" or "multiemployer bargaining"—either by a group of employers who refuse to bargain separately, or by a group of separate employee bargaining units who refuse to do so—without the other party's consent constitutes unlawful insistence on a nonmandatory subject, namely, the expanded scope of the bargaining unit. *See, e.g., Utility Workers Local 111 (Ohio Power)*, 203 NLRB 230, 238 (1973), *enf'd*, 490 F.2d 1383 (6th Cir. 1974) (finding union to have violated NLRA by "insisting that final settlements of the collective-bargaining contracts covering separate units of employees of Ohio Power, Central Operating, and Wheeling Electric be withheld until final agreement was reached between the Respondents and the Employers in all the units in which the bargaining was taking place."). On the other hand, both the NLRB and the courts also have recognized that "coordinated bargaining," a practice whereby parties share information and coordinate efforts but ultimately retain the authority to negotiate contract terms individually, is lawful under the NLRA. *See, e.g., General Electric Co.*, 173 NLRB 253 (1968), *enf'd*, 412 F.2d 512, 514 (2d Cir. 1969).

The principal question presented by this case is whether the Pact created an unlawful multiemployer bargaining relationship among the Distributors, or whether the Pact merely reflected a lawful agreement to form a coordinated bargaining group within which each member would retain independent contract-making authority. There are no "magic words" that distinguish an agreement for un-

lawful multiemployer bargaining from a simple coordinated bargaining agreement. *See City Roofing Co.*, 222 NLRB 786, 789 (1976), *enf'd sub nom. NLRB v. R.O. Pyle Roofing Co.*, 560 F.2d 1370 (9th Cir. 1977). Instead, the task of a reviewing agency or court is to examine the totality of the circumstances surrounding the agreement to determine whether the signatories truly retain independent bargaining authority, or whether the group of signatories retains effective veto power over the bargaining behavior of individual group members. *See Utility Workers*, 203 NLRB at 239 ("a policy such as uniformity, innocent in and of itself, can in context become a vital part of an illegal pattern of conduct").

Here, the record is replete with evidence that the Distributors in fact conducted unlawful multiemployer bargaining. For example, while the Pact specified several seemingly flexible bargaining goals, it also laid down several specific non-negotiable contract terms applicable to all Pact signatories. *See supra*, at 5-6 (specifying, for example, "[c]ooler and basement deliveries required," "no curfew," "no restrictions on number of part-time employees," and "common expiration date"). The Pact further provided a huge financial penalty to any Distributor that either deviated from any of the specific contract terms or negotiated directly with the Union; such a Distributor would have to pay $400,000 to each other party to the Pact, a total of $1.6 million for each violation.[7] Perhaps most tellingly, no Distributor ever offered a contract proposal different from that offered by every other Distributor; even when the Union made a proposal addressing an issue unique to a particular Distributor, an identical counterproposal was always forthcoming from all six Distributors.

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[7] Because Don Lee (Warren) and Don Lee (Dearborn) were owned by the same parent company, they collectively count as only one Distributor for purposes of the Pact.

Against this factual backdrop, the Distributors argue that the Pact in fact reflected only an innocent coordinated-bargaining strategy. The Distributors advance three principal arguments: first, they argue that the Pact did not actually confer "veto" power on the collective; second, they assert that, contrary to the ALJ's finding, the Distributors did not "reach[] an agreement . . . about exactly what they wanted" in the Pact; and third, they contend that the Pact's requirement that the Distributors not negotiate "directly" with the Union did not necessarily preclude individual Distributors from reaching individual agreements with the Union. The Distributors' arguments misapprehend the scope of substantial-evidence review. The ALJ's conclusion that the Pact effectively conferred collective veto power on the Distributors is supported both by the Pact language imposing a $1.6 million fine on any Distributor that reached an agreement with the Union inconsistent with the express provisions set out in the Pact, and by the fact that no Distributor provided an individual offer (even in the face of Distributor-unique proposals offered by the Union). With respect to the ALJ's finding that the Pact reflected an *ex ante* agreement on "exactly" what the Distributors wanted in their contracts, it is true that some of the Pact's contract provisions are vague (*e.g.*, "[m]ore restrictive grievance procedure"); however, other provisions are quite specific and leave no room for negotiation (*e.g.*, "[n]o curfew"). Finally, on the issue of whether the "no direct negotiation" clause precluded individual Distributors from reaching individual agreements with the Union, the ALJ certainly was entitled to infer from the Distributors' actual behavior that the Pact precluded such agreements. The fact is that, even when presented with Distributor-specific proposals that had no application or relevance to any other Distributor, each of the six Distributors responded with an identical counterproposal. On this record, there is at least substantial evidence—we would be more likely

to call it overwhelming evidence—that the Distributors were engaged in unlawful multiemployer bargaining without the Union's consent.

B

The Distributors' secondary argument is that, even if their conduct constituted unlawful multiemployer bargaining, the General Counsel's complaint focusing on this charge was untimely. Section 10(b) of the NLRA provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. . . ." 29 U.S.C. § 160(b). "[T]he intended purpose of [Section 10(b)] is that, in the absence of a properly served charge on file, a party is assured that on any given day its liability under the Act is extinguished for any activities occurring more than six months before." *Chemung Contracting Corp.*, 291 NLRB 773, 774 (1988). Here, the Distributors argue that the multiemployer-bargaining charge is time barred because the Union should have been aware of the Pact by July 1990, but did not lodge a complaint with the Regional Director until April 1991. Alternatively, the Distributors argue that the six-month limitations period ran between the date on which the Regional Director declined to file a complaint on the multiemployer-bargaining issue (October 1991) and the date on which the issue was revived via the General Counsel's motion to amend (February 1993). In response, the NLRB argues that it is entitled to tolling of the limitations period both because the multiemployer-bargaining allegation is closely related to other, timely-filed allegations contained in the complaint, and because the Distributors fraudulently concealed the substance of the Pact during the entire course of collective bargaining.

There are at least two generally recognized exceptions to the six-month filing rule. First, a complaint may be amended to add allegations relating to conduct more than

six months old as long as the conduct occurred no more than six months before the filing of the charge underlying the complaint, and as long as the allegations in the amendment are closely related to that charge. *See, e.g., Henry Bierce Co. v. NLRB,* 23 F.3d 1101, 1108 n.1 (6th Cir. 1994); *Truck Drivers & Helpers Union, Local No. 170 v. NLRB,* 993 F.2d 990, 1000 (1st Cir. 1993). Relying on its decision in *Redd-I, Inc.,* 290 NLRB 1115 (1988), the NLRB ruled here that the multiemployer-bargaining amendment was timely because it was closely related to the original charge's allegation of unilateral implementation of employment conditions before a bona fide impasse was reached. The NLRB reasoned that "the joint bargaining allegation is of the same class of violations in that it concerns negotiating conduct governed by Section 8(a)(5) of the Act; it involves the same factual setting and sequence of events, in that all the theories call for analysis of the entire course of bargaining; and the Respondents raised virtually the same defenses."

The Distributors' primary argument against application of the "closely related" exception to the six-month limitations period is that the date on which the Pact was signed (January 18, 1990) was almost 15 months before the date on which the original charge was filed (April 3, 1991). This argument is nonresponsive. The Union's complaint is based not on the Distributors' act of signing the Pact, but on their behavior during the entire course of collective bargaining. It is undisputed that the alleged unfair labor practice of bargaining without disclosing the terms of a multiemployer-bargaining agreement occurred within six months of the date on which the original charge was filed, and therefore we are not persuaded by the Distributors' primary argument. Secondarily, the Distributors assert that there is insufficient factual commonality between the multiemployer-bargaining charge and the charges contained in the original complaint to support a "closely related" finding. Under the substantial evidence test, how-

ever, we must affirm the NLRB's decision because the record demonstrates that the amendment involved the same statutory provision, required assessment of the same Distributor conduct implicated in the original complaint charges, and demanded consideration of the same evidence. The amendment, after all, need not be identical to the charges contained in the original complaint; it need only be "closely related," and the NLRB has shown substantial evidence here that it is. *Cf. United States Can Co. v. NLRB*, 984 F.2d 864, 867 (7th Cir. 1993) (affirming NLRB's finding that amendment was "closely related" to original complaint allegations because substantial evidence supported agency's finding that new allegations involved same basic employer conduct as old allegations).

The second generally recognized exception to the six-month filing requirement is fraud, and we would be hard-pressed to disagree with the NLRB's finding that the Distributors fraudulently concealed the terms of the Pact. Fraudulent concealment of a material fact underlying an unfair-labor-practice charge tolls the six-month limitations period. *See, e.g., Ducane Heating Corp.*, 273 NLRB 1389, 1390 (1985), *enf'd*, 785 F.2d 304 (4th Cir. 1986); *cf. Davis v. Smith's Transfer, Inc.*, 841 F.2d 139, 140 (6th Cir. 1988) (recognizing fraudulent concealment doctrine but finding facts insufficient to toll limitations period). Here, the facts could scarcely be stronger in support of the NLRB's finding of fraudulent concealment. The Union repeatedly asked about the existence of a mutual aid pact, beginning with the very first collective bargaining session. The Distributors' responses were generally evasive (*e.g.*, Long's statement to Knox that the existence of the Pact was "none of his business and that it was not relevant to bargaining," *see* J.A. at 1556), and were sometimes downright untruthful (*e.g.*, the statement of two Distributor representatives that there was no mutual aid pact at all, *see id.* at 1780). During the Regional Director's investigation, no copy of the Pact was produced; it was not

until an administrative subpoena was issued in connection with the hearing before the ALJ that anyone other than the Distributors saw the text of the Pact.

Even were we inclined to accept the Distributors' argument that the Union was on notice of the *existence* of some agreement, the record makes absolutely plain that the Distributors kept the terms of the Pact a closely-held secret. Not only did the Distributors go so far as to ignore a subpoena in another proceeding demanding production of a copy of the Pact, but Long and his associates flagrantly misrepresented the Pact's terms—going so far as to say, for example, that there was no penalty to any Distributor for negotiating directly with the Union or for using a negotiator other than West Coast, *see* J.A. at 1674, when the Pact clearly prohibited such acts on pain of a substantial financial penalty. In the face of these facts the Distributors' main argument against invocation of the fraud exception—that "[t]he Union and the General Counsel failed to exercise due diligence"—borders on the disingenuous. Moreover, it is no answer to say that the Union possibly knew that a pact existed when they clearly did not know its terms; the Union had no way to ascertain whether the Pact provided for lawful coordinated bargaining or unlawful multiemployer bargaining without knowing its precise terms. Accordingly, we hold that the NLRB correctly invoked the fraudulent concealment doctrine and properly permitted the complaint as amended to go forward.

C

The parties raise a number of other issues: the Union argues that Powers Distributing's unilateral "can bag" policy was unlawful (independent of the legality of the Pact) and that certain conditions imposed by some of the Distributors were inconsistent with the Distributors' final offers, and the Distributors argue that the Union's own bad faith during the course of the collective bargaining precludes a finding against the Distributors. Because we

affirm the NLRB's order finding that the Distributors' entire course of conduct was unlawful, and therefore that no valid impasse was reached that would permit any Distributor to implement a "final offer" unilaterally, we need not address the Union's arguments. With respect to the Distributors' argument, we agree with the District of Columbia Circuit that where a party to collective bargaining imposes an unlawful precondition to bargaining—as here, where the Distributors essentially conditioned bargaining on the Union's acceptance of the Distributors' multi-employer bargaining unit—that party's conduct excuses the other party's obligation to bargain in good faith. *See Local 777, Democratic U. Organizing Comm. v. NLRB*, 603 F.2d 862, 911 (D.C. Cir. 1978).[8] The essence of the NLRB's ruling in this case is that, by secretly entering into a pact that restricted the right of the individual Distributors to negotiate with the Union, the Distributors collectively had agreed in advance not to budge on a non-mandatory bargaining subject. The Union's subsequent bad faith, if there were such, is therefore irrelevant.

IV

For the foregoing reasons, the Distributors' petition for review of the NLRB's order is DENIED, and the NLRB's petition to enforce its order is GRANTED.

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[8] Unlike this case, the District of Columbia Circuit was confronted with a situation where the union, rather than the employer, imposed the unlawful precondition. The principle, however, is the same. Translating the District of Columbia Circuit's reasoning into the context of this case, we hold that "if [an employer] insists on speaking on behalf of persons for whom it cannot properly so insist, [a union] cannot be faulted for refusing to bargain." *Local 777*, 603 F.2d at 911 (quoting *NLRB v. Kelley Bros. Nurseries, Inc.*, 341 F.2d 433, 440 (2d Cir. 1965) (Friendly, J.)).

AGREEMENT

THIS AGREEMENT is entered into by and between DON LEE DISTRIBUTOR, INC., POWERS DISTRIBUTING COMPANY, INC., HUBERT DISTRIBUTORS, INC., OAK DISTRIBUTING COMPANY, INC., KOZAK DIST., INC., EASTOWN DISTRIBUTORS CO., (thereafter, each to be referred to as Distributor) and shall relate to collective bargaining with Teamsters Local # 1038 of Detroit, Michigan.

WHEREAS, each of the foregoing is a Distributor of beverages and an Employer of employees represented by Teamsters Local # 1038 (hereafter "Union") which has a collective bargaining Agreement with each Distributor and;

WHEREAS, each Distributor is desirous of correcting and/or improving the language and economics of its respective collective bargaining Agreement with said Union to reflect more nearly market supply and demand conditions, to correct unreasonable health & welfare and pension costs for the benefits received and to negotiate improvements in operational efficiencies, and;

WHEREAS, the Union has had a history of striking or bringing pressure to bear on certain Distributors or certain groups of Distributors to force bad Agreements on all Distributors that are fraught with operational inefficiencies, featherbedding practices, excessive costs and practices which restrict and hamper Distributors rights, and;

WHEREAS, each Distributor can offset the Union's bargaining power by entering into a mutual aid agreement and coordinated bargaining effort.

THEREFORE, IT IS AGREED AS FOLLOWS:

1. Each Distributor shall enter into its own Agreement with the Union. Nothing contained herein shall be construed to reflect a multi-employer association nor create a multi-employer unit. This document reflects

a coordinated bargaining effort among individual and independent Distributors.

2. Each Distributor shall share costs and expenses of Fred R. Long and his associates who shall represent the Distributors bargaining efforts with the Union and cover the following services.

   A. Prepare for negotiations with the Union.

   B. Conduct negotiations with the Union.

   C. Prepare each Distributor to be able to effectively take and win a strike should the Union call one.

   D. Prepare a public relations strategy and effort to counter any Union effort to boycott a Distributors' product lines or to otherwise discredit any Distributor.

   E. Prepare an informational campaign to customers of Distributors (i.e., retailers) to keep them alert to Union ploys and advise them of their rights and powers under the law.

   F. Represent Distributors in Unfair Labor Practice charges or law suits filed against the Union or defending Union Unfair Labor Practice charges and/or suits filed against the Distributor(s) or its agent(s).

   G. Assist Distributors in resolving employee job actions, if any.

   H. Other services a majority of Distributors to this Agreement may authorize.

   Such costs shall be shared by Distributors based on the formula as noted in Exhibit A attached and made part of this Agreement by reference.

3. Each Distributor shall share the costs and expenses of any strike called against one, some or all Distributors which costs shall include security services and legal

services covering the facilities as well as the equipment at the facility and on the road (provided the Distributor shall not have violated a State or Federal law or regulation in which case that element of cost involved in the violation shall be born solely by the distributor who committed the violation).

Such costs shall be shared by Distributors based on the formula as noted in Exhibit A attached and made part of this Agreement by reference.

4. Each Distributor shall participate in and fund any media or public relations campaign for the purpose of advising the public and customers of the status of Union activity or to counter any Union effort to discredit any or all distributors. The fund will not exceed $100,000 without approval of the negotiating wholesalers. All expenditures are to be approved by the group.

   Such costs shall be shared by Distributors based on the formula as noted in Exhibit A attached and made part of this Agreement by reference.

5. Each Distributor in the event the Union calls a strike against any one, some or all Distributors shall take no action inconsistent with the purpose of this Agreement; nor shall any Distributor not struck seek to take advantage of said strike conditions to the detriment of the struck Distributor or any of them.

6. Shared costs as described in exhibit A shall only apply, in the event of a strike against any one, some or all Distributors for a period of ninety (90) calendar days from when the strike against any one, some or all commenced. After ninety (90) days from the onset of any strike, all strike related expenses shall be borne by the Wholesaler affected.

7. Distributors agree to the establishment of the minimum objectives, described in exhibit B, for a new

Collective Bargaining Agreement which can only be changed by a majority vote of the participating Distributors.

8. In the event any Distributor is in breach of this Agreement or negotiates directly with the Union (or any other Union or person or group who allegedly is representing this Union's Interest) or agrees to settle on terms and conditions in excess of those listed in item 7 herein above, that Distributor, in addition to any other damages for breach of this Agreement that may occur in any enforcement law suit brought by any of the other Distributions shall, in addition, pay to each of the other Distributors a penalty fee of $400,000 to each.

9. This Agreement may be enforced in any court of competent jurisdiction located with the State of Michigan and is enforceable pursuant to the laws of Michigan.

The parties acknowledge that they have carefully read this Agreement and understand their respective obligations under the Agreement and agree to be bound by its terms by affixing their signatures hereto this 18 day of January, 1990.

DON LEE DISTRIBUTOR, INC.	POWERS DISTRIBUTORS CO., INC.
by /s/ Donald L. Klopcic	by /s/ Gerald B. Powers
HUBERT DISTRIBUTORS, INC.	OAK DISTRIBUTING CO., INC.
by /s/ Alice Shotwell Gustafson	by /s/ Robert H. Baetens
KOZAK DIST., INC.	EASTOWN DISTRIBUTORS COMPANY
by _____	by /s/ James R. Quasarano

EXHIBIT A

Formula for Exhibit A will be each distributor's percentage share of total 24/12 case equivalent volume for calendar year 1989 as it relates to the total volume of the group.

	Cases	%
Don Lee Distributor, Inc.	5,751,010	27.9
Oak Distributing Co.	1,430,971	6.9
Eastown Distributors Co.	2,964,552	14.4
Powers Distributing Co.	5,290,446	25.6
Hubert Distributors, Inc.	3,410,254	16.5
Kozak Dist., Inc.	1,790,350	8.7
	20,637,583	100.0%

EXHIBIT B

1. Eliminate eight (8) hour minimum/maximum day.
2. Remove load limit.
3. Overtime after forty (40) hours per week.
4. Management rights clause.
5. More restrictive grievance procedure.
6. Single pay holidays.
7. Simplified vacation language.
8. Four (4) weeks maximum vacation, red circle everyone over.
9. Cooler and basement deliveries required.
10. Reduction in wages.
11. Refined benefit pension plan—percentage of earnings.
12. Insurance revisions.
13. No curfew.
14. Bulk deliveries.
15. Zipper clause.
16. Empty pick up rate.
17. Longer probation period.
18. No restrictions on number of part-time employees.
19. Reduction on commission when helper is used.
20. More flexibility with reclamation duties.
21. Common expiration date.
22. Minimum three year contract.

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Donald Klopcic, Jr.
Don Lee Distributors
14301 Prospect
Dearborn, MI 48216

Request therefor having been duly made by Local 1038 of the National Conference of Brewery and Softdrink Workers, IBT whose address is 2741 Trumbull Avenue, Detroit, MI 48216

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE a Hearing Officer of the National Labor Relations Board, at Room 300, Patrick V. McNamara Federal Bldg., 477 Michigan Avenue in the City of Detroit, Michigan on the 8th day of March, 1990, at 9:00 o'clock a.m. of that day, to testify in the Matter of

Don Lee Distributor, Inc.
Case No. 7-UC-374

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

See attached sheet.

B-37283

[NLRB logo

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto authorized the issuance hereof.

Issued at Detroit, Michigan this 1st day of March 1990.

/s/ Mary Cracraft

NOTICE TO WITNESS.—Witness fees for attendance, subsistence, and mileage, under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

ATTACHMENT TO SUBPOENA DUCES TECUM TO DONALD L. KLOPCIC, JR. IN NLRB CASE NO. 7-UC-374

The information and documents requested in each paragraph listed below pertain to both the Dearborn and Pontiac facilities of Don Lee Distributor, Inc. The term "Employer" also refers to Don Lee Distributor, Inc. and both its Pontiac and Dearborn facilities.

1. Payroll records for all employees covered by the Employer's collective bargaining agreement with Teamsters Local 1038 for the period January 1, 1987 to the present.

2. Any and all records demonstrating ownership and/or control of the Employer for the period January 1, 1987 to the present.

3. The Employer's Articles of Incorporation and any amendments thereto.

4. For the last 3 fiscal years, the Employer's Annual Reports, its State, Federal and Municipal income tax returns, and its annual, semi-annual and quarterly balance sheets and revenue statements. Please include records of any and all intra-corporate cancellations, intra-corporate balancing statements and intra-corporate transactions.

5. Any records demonstrating the flow chart or chain of command at the Employer's facilities for the period January 1, 1987 to the present.

6. Rosters or any similar documents listing the names of all individuals working for the Employer and their respective jobs, classifications and titles including managerial, supervisory, clerical and sales employees as well as employees covered by the collective bargaining agreement with Teamsters Local 1038.

7. Any and all records or documentation of beer orders for the period January 1, 1989 to the present.

8. Any and all records of transfers of beer or wine inventory between the Employer's Pontiac and Dearborn facilities for the period January 1, 1987 to the present.

9. Any and all records such as purchase agreements, titles, leases, contracts, or similar documents pursuant to which the Employer owns or is furnished beer delivery trucks for the period January 1, 1987 to the present. Additionally, any and all records documenting whether or not trucks are assigned to the Dearborn facility or the Pontiac facility and any changes in such assignment of trucks.

10. Any and all documents registering and licensing beer delivery trucks for the period January 1, 1987 to the present.

11. Any and all records of motor vehicle insurance for the beer delivery trucks for the period January 1, 1987 to the present.

12. Any and all records of Employer payments for health insurance and medical bills for employees covered by the collective bargaining agreement with Teamsters Local 1038 for the period January 1, 1989 to the present.

13. Copies of any life insurance plans, health insurance plans, disability insurance plans and summary descriptions of any such plans for the period January 1, 1989 to the present.

14. Payroll records for Bob Morris for the period January 1, 1988 to the present.

15. Payroll records for employee P. McCusker for the period January 1, 1988 to the present.

16. The power of attorney and any additional documents or records pertaining to the Employer's participation in the DDOM Wholesalers' Association for the period January 1, 1987 to the present including any documents describing the Employer's present relationship to the DDOM.

17. Any and all documents such as powers of attorney, contracts, agreements, memoranda or similar documents pertaining to the Employer's membership or participation in *any* employer association or to the Employer's assignment of bargaining and/or representational rights and/or responsibilities to any such employer association or entity or individual including West Coast Industrial Relations, Fred Long, Patrick Jordan or thg firm of McLaughlin and Irvin from January 1, 1988 to the present.

18. A list of each and every employee classified or performing the work of a "truck counter" and/or "truck porter" for the period January 1, 1987 to the present. Additionally, for the period January 1, 1987 to the present, please provide any and all memoranda, handbooks, policy manuals, correspondence or similar documents containing a description of the classifications or jobs of "truck counters" and/or "truck porters."

19. Complete employment records for each and every employee performing the job of "truck counter" and/or "truck porter" for the period January 1, 1987 to the present including such records which show date of hire, rate of pay, payroll ledger, changes in pay, insurance coverage, hours of work, and records of any and all fringe benefits.

20. Records of contracts, agreements or similar documents for the distribution of beer and wine between the Employer and its customers for the period January 1, 1989 to the present.

21. Records of purchase of beer, wine and other beverages between the Employer and producers for the period January 1, 1989 to the present.

22. Any and all documents, records, invoices, payments, leases and/or contracts between the Employer and Wayne Hunt Trucking for the period January 1, 1989 to the present.

23. Any and all records demonstrating name(s) of the Employer's accountant(s), attorney(ies) and others providing professional services to the Employer, including any employer association or other person rendering labor relations, consulting, or related services to the Employer for the period January 1, 1987 to the present.

24. Any and all records of trucking or shipping services purchased by the Employer from outside entities and/or persons for the period January 1, 1989 to the present.

25. The Employer's general ledger for the period January 1, 1989 to the present.

26. Any records, documentation or ledgers reflecting the Employer's accounts payable for the period January 1, 1989 to the present.

27. Any records, documentation or ledgers reflecting the Employer's accounts receivable for the period January 1, 1989 to the present.

28. Records of workers' compensation insurance, fire and theft insurance, property insurance, unemployment insurance for the period January 1, 1989 to the present.

29. Any contracts, agreements or similar documents by and between the Employer and its suppliers (e.g. uniforms, maintenance service, landscaping services,

vending services, etc.) for the period January 1, 1989 to the present.

30. Any and all employment records of any employee of the Employer, (including employees who are not covered by the collective bargaining agreement with Teamsters Local 1038) who has worked at both the Pontiac and the Dearborn facilities of the Employer for the period January 1, 1987 to the present including such records which show the respective date or dates when each such individual worked at each facility.

DONALD KLOPCIC, JR., TESTIMONY BEFORE THE ALJ

[1563] Q. Mr. Van Goethem was present as the representative or a representative of the Don Lee facilities at each of the meetings that were held with Fred Long in 1990?

A. Was he a— Excuse me. Repeat that, please?

Q. All right. You testified that you attended on more meetings held with Fred Long during the months of January and February, 1990, correct?

A. Correct.

Q. Was Mr. Van Goethem at each of the meetings that you attended?

A. I don't recall.

Q. At some point during the month of January, 1990, you signed on behalf of both Don Lee facilities an agreement regarding the 1990 negotiations, correct?

A. Correct.

Q. And was that agreement signed at a meeting held with Mr. Long?

A. The document that you showed me before?

Q. No. Let me show you the document. I'm showing you what's been received in evidence as General Counsel's 18. Is that the agreement that you signed on January 18th of 1990?

A. Yes, it is.

Q. On behalf of both the Don Lee facilities, correct?

A. Correct.

Q. Now, Mr. Klopcic, you, in response to a question by the [1564] judge, indicated that you always sign your name Don Lee—Don L. Klopcic, Jr. Is there some reason that the Jr. is not indicated on your signature on this document?

A. No. That's my signature.

Q. Okay. Now was this document signed during one of the meetings with Mr. Long in January of 1990?

A. I don't recall if Fred was a the meeting when we signed this or not with the wholesaler group.

Q. Okay. Did everyone sign at the same time?

A. Everyone signed at the same time.

Q. You saw the other distributors—

A. That signed.

Q. —put their signatures on the document? Was Mr. Van Goethen present at that meeting where the document was signed?

A. I don't recall.

Q. All right. Sometime after the document was signed and after you sent the January 15th letter to Mr. Knox, requesting separate negotiations, the union did thereafter refuse to agree to separate the Don Lee (Dearborn) and Don Lee (Pontiac) facilities, correct?

A. Correct.

Q. And, as a result of that refusal, the employer, Don Lee (Dearborn)/Don Lee (Pontiac), petitioned the NLRB to resolve the issue via a unit clarification hearing, correct?

A. That's correct.

* * * *

[1565] That's what I testified to, yes.

Q. Okay. Mr. McKnight also asked you at the unit clarification hearing whether anybody on behalf of Don Lee had executed a power of attorney or similar document for purposes of the 1990 negotiations, correct?

A. That's line what? 22, 22?

Q. Yes.

MR. LONG: Of which page?

MS. PAPPAS: 111.

MR. LONG: Thank you.

BY MS. PAPPAS:

A. That's correct.

Q. And you testified under oath that the answer was no, correct?

A. Correct.

Q. All right. Since you're having trouble to recall, I will ask you to, before I ask my question, read page 112 from the top through Line 9.

A. I've read it.

Q. All right. Mr. McKnight asked you at the UC hearing whether you had executed a power of attorney or similar document giving certain powers to West Coast Industrial Relations Association, correct?

A. Correct.

Q. And, again, you testified under oath that the answer

* * * *

ROBERT VAN GOETHEM TESTIMONY BEFORE THE ALJ

[1601] A. Correct.

Q. All right. Mr. McKnight asked you, in addition, at the UC hearing, whether Don Lee Distributor had signed any kind of document memorializing the fact that it was going to bargain as part of a group regarding 1990 negotiations, correct?

A. Yes.

Q. All right. And you testified under oath that you did not know, correct?

A. Correct.

Q. You told Mr. McKnight under oath that Don Klopcic, Jr. would know the answer to that question, correct?

A. Correct.

Q. Mr. Knight also asked you whether Don Klopcic, Jr. had signed any kind of document which was similar to the power of attorney executed by him in 1987, correct? I direct your attention to Page 32.

A. Yes, he asked me that.

Q. All right. And you testified under oath that you weren't aware of that, correct?

A. Yes.

Q. Mr. Van Goethem, in your position with the two Don Lee facilities, does Mr. Klopcic give you legal documents relative to the operations of the company to retain in your possession?

A. Sometimes.

Q. And what kind of documents can you recall that he's

* * * *

WEST COAST INDUSTRIAL RELATIONS
ASSOCIATION, INC.
170 Knowles Drive, Suite 270
Los Gatos, CA 95030-1833

Strictly Personal and Confidential

MEMO TO: Oak, Don Lee, Powers, Hubert & Eastown (via Federal Express)

FROM: Fred R. Long

DATE: March 23, 1990

SUBJECT: For Discussion At Wednesday's March 28, 1990 Meeting

Although my personal contact in Detroit lately has been limited to discussions with Thomas, Armstrong and Geist, I sense a slight tinge of paranoia in the embryonic state.

Some of you seem to be concerned about the fairness or generousness of our economic positioning. Some about relatively minor language issues. Some don't understand why Pat Jordan's involved (i.e., he's a Fred Long crony). Most of you are probably concerned with the slow bargaining start. All of these and many more are valid concerns, but keep in mind the principal reason you hired me is because your Detroit contracts are one big mess and the costs are eating you alive *and* we know the Teamsters and their tactics better than anyone else in our business *and* although we're expensive, we get the job done (especially if you prepare, have a little faith in us and keep your cool). You have also had to endure my absence from on-site Detroit activity because of an acute error made by medical science, to wit, they licensed two (2) quacks to practice medicine.

This memo is not intended as a critique of any of us. Frankly, once we got started, *all of you* have cooperated with us and worked hard and we have no complaints. I also realize our *very late start* was caused by doing our

best to get others to join with us in resolving once and for all, the Detroit/Knox/Teamster mess. For anyone doubting, those that did not join our group did not do so because we were too radical; they did not join *because they were afraid*!! That was the same psychological problem that caused the current state of affairs with Detroit/Knox/Teamsters.

What the five of you want in the form of a signed contract is to get economics, language and featherbedding where it should be if things had been done properly in negotiations over the years, not to bust the Union or punish employees! However, anyway you slice it, to accomplish these goals it will be necessary to eliminate the atrocious featherbedding language and implement some serious economic changes which better reflect what goes on elsewhere in the country, e.g., Chicago, Buffalo, etc.

Now, let's reflect on what probably is the thought process at this time.

1. Knox and the Teamsters are losing a lot of sleep (not wanting to risk their members and their dues) because WCIRA is involved. If Knox strikes all of us and loses, his Local folds and he is out of a job. If he strikes one of us (e.g., Don Lee) and loses, he's dead meat trying to get a deal with anyone else because Don Lee would be the new pattern (just like West Side is for Grand Rapids and other cities in Western Michigan). The Teamsters have *never* beaten WCIRA in a strike. The Teamster's International has advised Locals it may be a dangerous proposition (units could be decertified and union income lost) to strike a WCIRA client.

   Strategy Question #1. If you are Knox do you strike us? I don't think he will, but if he does I know we will have a "whopper" on our hands, because *Knox's survival* is at stake. I also know the Detroit Metropolitan Area is too big and has a historical Union mentality for us to operate the same way we would

in another city (e.g., Providence). Winning a strike in Detroit requires a media effort (Rietz); a legal effort locally (Crandall and friends who were recommended by Rob Powers; and if all hell breaks loose, we've got two other groups in the wings—one recommended by Alice Gustafson and the other a known quantity in Grand Rapids with prior experience in the areas we need that experience); a security effort (and you are deciding on those issues now); a benefits expert (and you have selected FlexBen); a comprehensive survey (WCIRA has provided); a project management team (Armstrong and Geist) to get you up to speed in strike preparation and assist you with problem resolution (e.g., employee job actions, NLRB matters, coordination amongst you, etc.).

2. Detroit Distributors have inevitably been perceived by Knox as easy to push around and out-maneuver. There is no doubt he knows this time he's in for a stormy ride. We know early on Knox has been discussing a new approach anticipating WCIRA's involvement and has been in contact with Harbrandt, the AFL-CIO corporate campaign strategist (courtesy of the FAX intercepted by Gustafson at Hubert). We know the highlight of such a campaign is to characterize our five distributors as greedy bastards hell bent to put drivers families on welfare using the evil WCIRA to do their dirty deeds.

   Stratgy Question #2. If we think Knox is afraid to strike us for fear of being defeated, is he not likely to drag out bargaining and pressure us with a corporate campaign? I believe we can expect this approach. However, as long as Knox can't conclusively prove WCIRA is involved, he doesn't have enough information to begin a corporate campaign. This is precisely why I brought in Pat Jordan. Initially to do the UC at Don Lee and RM at Powers. With that ongoing feint who better to establish bargaining dates

and protocol with Knox than Jordan. Knox has to be both frustrated and confused because although he knows WCIRA is lurking out there somewhere, he isn't sure yet on how he'll be attacked.

Meanwhile, Jordan, the son-of-a-bitch that he is, has put all kinds of pressure on Knox. Knox is used to having things his way and thats not happening! We are going to force him to meet with us during working time as well as on evenings and we are not going to meet with him at any Teamsters office. Have you done this before? We've already filed Refusal To Bargain Charges against Knox and we haven't met him face to face yet.

Meanwhile we have already structured and begun communications with the media and Knox is far behind because we know where we're going and he's not sure yet whether Jordan or someone else (WCIRA) will be the spokesman for substantive negotiations.

The reason we are not expanding this session beyond protocol is because we want to get as many dates set aside for bargaining as possible and if Knox refuses he'll have more problems with our unfair labor practices charges against him. Not a good way for Knox to start a corporate campaign against us. (As a sidelight, the reason I selected Jordan is several fold. I have worked with him frequently and am comfortable with his expertise and jugular vein instinct. I don't have to break a new attorney in who I'm not sure will perform up to my expectations. You can not find a better labor lawyer technically and tactically than Jordan. Jordan does not need this work. He's doing me the favor. Nor do I have any doubt that Jordan will intimidate Knox and Knox's attorney if he brings one.)

It is my intent, when we do make our first proposal to Knox, to highlight the elimination of the featherbedding issues and other contract language problems

and advise Knox that although Detroit's compensation is totally out of line, we will reserve our position on economics which shall remain "open" until we see how "he" responds to our desire to eliminate featherbedding and restrictive contract language.

3. Knox will be able to mobilize that which is left of the area labor movement behind him. At best this effort will be marginally effective in Wayne County probably in the form of a request to boycott certain products (i.e., Don Lee products). A boycott by labor in Oakland County could actually help sales. McComb County should be somewhere in between.

   Our media position should be (amongst others) that those Unions who support Knox are supporting featherbedding, corruption and causing other businesses to think twice before locating or expanding in Michigan. Michigan needs more jobs and better jobs and that won't happen if the Union's mentality doesn't change. How can Unions support $50,000 a year drivers with the lowest productivity in America Something is wrong with that thinking!

   Perhaps you're beginning to see why I've stressed the importance of media preparation and public relations.

4. Is it probable that Knox will delay, delay, delay?

   I suspect that's what he'll do. His odds of winning a strike aren't good. As long as he's able to he'll do whatever he can to delay an impasse. He'll try to use his political and labor buddies to pressure you and say without WCIRA we could make you such a deal! He'll rely on your lack of patience and your costs for us and others to defeat your resolve. He'll tell his employees they must have patience. This seems to be the safest approach for Knox to keep getting dues from members and therefore keeps his job.

   The problem he has is what to do with the non-WCIRA represented distributors during this time

period. I've been told he's already offered a six (6) month extension if they don't select WCIRA as their representative. I suspect he may continue that practice. However, should we reach impasse and implement that will create tremendous pressure on the other distributors and Union if their contracts are not yet settled.

5. The foregoing is speculative, but conveys to you my thinking process and inducement for you to be prepared for any eventuality.

   However, it should take the edge off your concerns about *perfecting a final offer* amongst you. If our offer were 50% more generous than it is today, but only 10% less than what it was in the expiring contract, Knox won't accept it. Politically he'd rather see us implement the final offer *you want* than be accused by his members of agreeing to modest cuts. Politically he can survive longer if we are forced to implement cuts. In any event, we must be flexible if Knox does get reasonable and serious about reaching an agreement with us.

   If it becomes necessary to implement (presuming Knox will not make the concessions we need), we'll try to keep your costs as reasonable as we can without jeopardizing your preparedness. We will be able to shuffle step better when Knox's strategy becomes more clear to us. Right now I don't think he or anyone else in the Teamsters have any ideas how best to handle this mess Knox got himself into. That's why we are running into their delay tactics. Although you may not agree, the Knox delay tactics are helping us. We are catching up from our late start. That means we can be the one's constantly applying the pressure in the months to come.

6. The latest rumblings (the March 13, 1990 Union meeting and the Rob Powers—Celini meeting in Flor-

ida) would tend to support 5 above as probable. If Knox is ever in a position politically to accept an agreement with us it might take two (2) years. Our concern is how quickly we reach an impasse and savings (if an agreement is not possible as I believe).

In Conclusion

Digest this thinking. I'll be interested in your thoughts, ideas, concerns and comments at Wednesday's meeting. The better we communicate the better things will turn out.

I think it is significant that the contents of this letter shows *I clearly trust all of you!* It should be kept at your home for purposes of second guessing me at some time in the future, if I'm wrong. It should not be discussed beyond your specific need to know people. It should not be discussed with other distributors (i.e., Celini, Kozak); or anyone else beyond your need to know group.

It is also time for you to begin trusting me to do what's best for you given my knowledge and experience with unions in general and the Teamsters in particular. We want you to be successful as much as you want to be successful.

Sincerely,

/s/ Fred
FRED R. LONG

FRL:mjb

bcc: W. C. Thomas

TESTIMONY OF WILLIAM CHRIS THOMAS BEFORE THE ALJ

[2125] Q. Did you ask Mr. Long whether he thought the pact was encompassed by this request that Mr. Knox had made at the September 20th bargaining session?

A. No, the—the first time I talked to Mr. Long after he mentioned it to me in—in early June of '90 about that document, again, was after my meeting with Mr. Wollack, and I asked to see the document and reviewed it. That's the first time I saw its contents and talked to him about it.

JUDGE SCHLESINGER: The testimony is you had never seen it—uh—

THE WITNESS: Prior to—

JUDGE SCHLESINGER: —before that?

THE WITNESS: —prior to the meeting—Mr. Wollack's request, I had never seen it.

BY MS. PAPPAS:

Q. In response to Mr. Wollack's request at the July 12th, 1991 bargaining session, you asked him whether if you produced those documents—the pact—the union would agree to bargain on a group basis, and you—

A. I did.

Q. —pardon me?

A. I did.

Q. You understood that the pact had something to do with bargaining as a group?

[2126] A. No, the—what I understood was that Bob had asked for separate bargaining. I'm saying—when I —when I said that to Steve I was saying, if I give you this, will you agree to bargain on a joint basis so that we can expedite this process? And I think his response was, I don't know.

Q. You had never seen the document up to that—at—as of that point in time, correct?

A. That's correct.

Q. You had no idea what the specifics of its content were, correct?

A. The only thing that I knew about the content was the fee schedule as I had helped Mr. Long on certain billings.

Q. And yet in response to Mr. Wollack's request, you queried whether if you turned over the document the union would agree to bargain on a group basis?

A. I did.

JUDGE SCHLESINGER: Why did you ask him that?

THE WITNESS: Because I wanted—I wanted to get back into a—into a coordinated format to expedite the bargaining. The union had insisted upon this individual bargaining and I figure, okay, if I get this for him and get it to him, will he agree to bargain on it on a coordinated basis to expedite the process. That was—that was my intent at the time that I made those [2127] statements.

BY MS. PAPPAS:

Q. If you knew nothing about what the document said, Mr. Thomas, and you had never seen it before, then why would you have thought that turning over the document to the union would have prompted their agreement to bargain on a group basis?

A. Because this—they considered this to be an important document and I figure if I—said if I got that for you, would you bargain on a group basis. That was the basis of my statement.

Q In response to any other of their information requests prior to that time, had you countered with if I give you this piece of information will you bargain on a group basis?

A. I don't think so.

Q. It was only when Mr. Wollack made the request for any agreement between the companies that you countered with an inquiry as to whether that document would allow the union to bargain on a group basis, correct?

A. Yes.

C. At the December—or, I'm sorry, September 20th bargaining session, I believe you testified the union initially presented a proposal on Article 1. Do you recall that testimony?

* * * *

WEST COAST INDUSTRIAL RELATIONS
ASSOCIATION, INC.
170 Knowles Drive, Suite 210
Los Gatos, CA 95030-1833

Federal Express #1985151910

July 6, 1992

Mr. Walter Meyer
Acting Director, Office of Appeals
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, DC 202570-0001

Re: Local 1038 Teamsters and Detroit Beer Distributors —7-CB-8495; 7-CB-8541; 7-CB-8685; 7-CB-8541 (Amended); 7-CB-8778; 7-CB-8871 and 7-CA-31719 (2)-(7)

Dear Mr. Meyer:

The subject cases have been in Appeals for about ten (10) months now. I'm told the June 9, 1992 oral presentation by the union on subject cases was postponed because of the unavailability of the union's lead counsel.

I am mindful that Mary Shanklin was the party of contact when all this began. However, I am very concerned that we get decisions from your Division on these issues without further delay for these reasons:

1. My clients are substantially at risk (in the millions of dollars) and that potential liability grows daily.
2. All parties to the case set for trial have agreed to a September 21, 1992 trial date. Although the union's attorney, Sam McKnight, Esq. and I have attempted to settle this case, we have failed. It's not going to settle.
3. We need a decision so we know what it is we are going to be litigating. All parties have to prepare for

trial and time is growing short. Further delay in getting decisions on the issues will have a serious and negative impact on all parties.

In an effort to make it easier for you to refresh your recollection on what's involved in these cases, I have digested them for your benefit by time frame:

7-CB-8495—Regional Director found union violated § 8(b)(3) of the Act by refusing to provide information requested by Employer. [Unilateral settlement by RD is being appealed by Employers.]

7-CB-8541—Regional Director found union engaged in surface bargaining from March 1990 through January 1991, violating § 8(b)(3) of the Act. [Unilateral settlement by RD is being appealed by Employer.]

7-CB-8685—Regional Director found union engaged in bad faith bargaining violating § 8(b)(3) of the Act. [Unilateral settlement by RD is being appealed by Employers.]

7-CB-8541—Employers allege union continued to engage in surface bargaining by offering second complete counter proposal (in the series of bargaining sessions *immediately after* RD found union had engaged in surface bargaining through January 1991) more regressive than its only other proposal (its initial proposal made in March 1990) including for the first time the raising of non-mandatory subjects of bargaining (a year after bargaining began). [RD dismisses and Employer's appeal on ground union's conduct is nothing more than a continuing pattern of improper conduct and not an isolated incident as RD determed].

7-CB-8778—Employers allege union (at June 12, 1991 bargaining session) flatly refused to negotiate over mandatory subjects of bargaining including those lawfully implemented on February 7, 1991. [RD dismisses stating that issuing a complaint would not serve the purposes of

the Act since union agreed—*after* Employer filed the subject charge—it would negotiate on these subjects at the bargaining session on July 13, 1991. Employer has appealed on ground union's conduct is nothing more than a continuing pattern of improper conduct and not an isolated incident as RD determined.]

7-CB-8871—Employers allege union refused to discuss (at August 21, 1991 bargaining session) and has continued to refuse to discuss (since September 13, 1990) any part of Employers Last Best and Final Offer. [RD dismisses on theory that union's demand that Employers rescind both their February 7, 1991 and April 15, 1991 implementations of their final offer with no discussion of specifics satisfied union's obligation to discuss mandatory subjects of bargaining. Employer has appealed on ground union's conduct is nothing more than a continuing pattern of improper conduct and not an isolated incident as RD determined.]

7-CA-31719(2)-(7)—Union alleges Employers engaged in illegal coalition bargaining. Employers, at the very first bargaining session with union offered in writing to meet on either a coordinated basis or individual Employer basis with union. Union's initial written proposal to Employers in March 1990 was identical for all Employers. All prior agreements between union and Employer were identical in terms and condiitons for all Employers. Coordinated bargaining lasted from March to June 1990 whereupon union insisted all further meetings be by individual Employer only. Employers conceded to union demand although they told union its actions were designed to stall and prolong negotiations. Union alleges Employer had some kind of agreement making bargaining illegal. Although union could only speculate, Employers had only one agreement amongst them and that was a mutual aid pact sharing costs to pay negotiations, security protection if a strike occurred and related. None of the parties entered into any agreement that would restrict

their bargaining. However, all of them would periodically agree on common positions they wanted to take during negotiations so they couldn't be whipsawed by the union [RD investigated union's allegations and dismissed them.]

I am also enclosing an outline prepared by Peter Nash, Esq. (provided at Employer's December 13, 1991 oral presentation before General Counsel) that may be helpful to you in reviewing the issues involved.

I recognize you and the others in Washington are very busy people and I was reluctant to bother you. However, this is the only vehicle I know of short of Section 6(a) of the Administrative Procedure Act to try and get the ball rolling. Any effort by you to unplug the system will be greatly appreciated.

Sincerely,

/s/ Fred R. Long
FRED R. LONG, ESQ.

FRL:mjb

Enclosure

STATUTORY PROVISIONS

29 U.S.C. § 158:

Unfair labor practices

(a) It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * * *

(d) Obligations to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder. . . .

28 U.S.C. § 160(b) and (f):

Complaint and notice of hearing; answer; court rules of evidence applicable

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board . . . shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to filing of the charge with the Board and the service of a copy thereof

upon the person against whom such charge is made. . . . Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

* * * *

Review of final order of Board on petition to court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals . . . by filing in such a court a written petition praying that the order of the Board be modified or set aside.

* * * *

Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.